INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

LaGrand Case

(GERMANY *v.* UNITED STATES OF AMERICA)

VOLUME II

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

Affaire LaGrand

(ALLEMAGNE c. ÉTATS-UNIS D'AMÉRIQUE)

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This case, entered on the Court's General List on 2 March 1999 under number 104, was the subject of a Judgment delivered on 27 June 2001 (*LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 466).

The documents relating to the case are being published in the following order:

Volume I. Application instituting proceedings; request for the indication of provisional measures; Memorial of Germany.

Volume II. Memorial of Germany *(continuation)*; Counter-Memorial of the United States of America.

Volume III. Counter-Memorial of the United States of America *(continuation)*; Verbatim Records of the Hearings.

*

For the purposes of this edition, the Court has decided that the written pleadings will be reproduced *in full*; it will therefore also include the documents annexed to those pleadings, which are not made available on the Court's website. The reproduction of all the annexed documents in this edition will enable practitioners to appreciate better the full scope of the arguments developed by the Parties in their written pleadings. As usual, the verbatim records of the public hearings appear after the pleadings; these verbatim records are published here in their final corrected versions, providing a useful supplement to the provisional versions made available on the Court's website.

Since the Court wishes to publish these documents as quickly as possible, it has been decided, where technically feasible, to reproduce the pleadings in the form in which they were submitted by the Parties.

Some documents in this edition have thus been scanned, and there are consequently two types of page numbering for the items included in these volumes: in addition to the normal continuous pagination, the original page numbers of the scanned documents are provided in brackets for reference purposes.

The Hague, 2012.

La présente affaire, inscrite au rôle général de la Cour sous le numéro 104 le 2 mars 1999, a fait l'objet d'un arrêt rendu le 27 juin 2001 (*LaGrand (Allemagne c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2001*, p. 466).

Les documents relatifs à cette affaire sont publiés dans l'ordre suivant :

Volume I. Requête introductive d'instance ; demande en indication de mesures conservatoires ; mémoire de l'Allemagne.
Volume II. Mémoire de l'Allemagne *(suite)* ; contre-mémoire des Etats-Unis d'Amérique.
Volume III. Contre-mémoire des Etats-Unis d'Amérique *(suite)* ; comptes rendus d'audience.

*

Aux fins de la présente édition, la Cour a décidé que les pièces de la procédure écrite seront reproduites *intégralement* ; cette édition comprendra donc aussi les documents annexés auxdites pièces — qui ne sont pas mis en ligne sur le site Internet de la Cour. La reproduction de l'ensemble des documents annexés dans cette édition permettra aux praticiens de mieux apprécier, dans toute sa portée, l'argumentation développée par les Parties dans leurs écritures. Comme à l'accoutumée, les comptes rendus des audiences publiques sont publiés à la suite des pièces de procédure écrite ; ces comptes rendus apparaissent ci-après dans leur version finale corrigée — qui complète ainsi utilement la version provisoire mise en ligne sur le site de la Cour.

La Cour souhaitant que lesdits documents paraissent aussi rapidement que possible, il a été décidé, chaque fois que les moyens techniques le permettraient, de reproduire les pièces de procédure en l'état où elles ont été présentées par les Parties.

Ainsi, certaines pièces de la présente édition ont été scannées et, de ce fait, les titres courants du présent ouvrage comportent deux genres de folios : outre la pagination continue habituelle, on trouvera, entre crochets, la pagination d'origine des pièces scannées, à laquelle il faudra se reporter en cas de renvoi.

La Haye, 2012.

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MEMORIAL OF GERMANY

MÉMOIRE DE L'ALLEMAGNE

LAGRAND CASE
(Germany v. United States of America)

MEMORIAL

OF THE

FEDERAL REPUBLIC OF GERMANY

Volume III

(Annexes MG 38 - 61)

16 September 1999

Annex MG 38

PRESS CONFERENCE OF THE U.S. STATE DEPARTMENT
(3 MARCH 1999)

do you think this was a target for that area, where they knew that foreigners could be?

MR. FOLEY: Based on the limited information we have thus far - it would look as though the latter scenario were the case; namely, that these rebels deliberately marched into Southwestern Uganda with the deliberate intent to sow terror among Western tourists -- perhaps, to discourage Western tourists from traveling to that part of Uganda. After all, the rebels have opposed the authorities in Uganda, as well, because of Uganda's support for Rwanda, Uganda's involvement in the internal conflict in the Democratic Republic of Congo.

It looks at this point, Betsy, to have been a deliberate act. I have no information that events inside Congo had pushed them in that direction, no.

QUESTION: Jim, could I switch to another law enforcement matter? Have you seen that the German government has issued an appeal to the International Court of Justice in the case of one of the Lagrand brothers in Arizona. Was the State Department at all involved in that process?

MR. FOLEY: Yes, I've seen that report. The case involves, as you say, Walter Lagrand, who is one of two brothers who committed murder during a 1982 bank robbery in Arizona. Both were convicted and sentenced to death, and Lagrand's brother was executed on February 24. Walter Lagrand's execution is scheduled for today in Arizona.

Germany is involved in this case because the two brothers were born in Germany and are German nationals, although they came to the United States as small boys, and lived here throughout their lives. Germany filed suit in the International Court last night on the grounds that the two brothers should have been advised that German consular officials could be notified of their arrest and detention.

The requirement for giving this advice to foreign nationals is set forth in the Vienna Convention on consular relations. Germany asks, among other things, that Walter Lagrand not be executed, pending the court's final decision in the case.

The Department of State has transmitted a copy of the papers filed with the court to the governor of Arizona. We understand that the governor has decided to proceed with the execution, assuming that it is not stayed by the US Supreme Court.

QUESTION: Does the State Department take a position, other than simply transmitting the documents?

MR. FOLEY: No, we have not. We simply transmitted the documents.

QUESTION: Could I ask one more Uganda question? Can you give us an idea of how serious a threat this is to the economy of Uganda, whether this particular tourist site brought in a lot of money for that government?

MR. FOLEY: Well, I don't have those statistics; perhaps the Ugandan Embassy might have that for you. We have, for our part, issued a Public Announcement, warning American citizens not to travel to that part of the country, pending further clarification of the situation there. When you have an incident - and we've not had one like this in that park - when something like this takes place, then we owe it to American citizens to warn them not to travel there any longer.

How long that warning would remain in effect would depend on events to follow: on the assessment of the threat, the assessment of what measures the authorities are putting in place -- not only to chase down the perpetrators, but to ensure that region becomes more secure and such events cannot happen again. It's difficult to forecast when we'll be able to revise our warning in that regard.

MR. FOLEY: Only that they are expected to resume this afternoon. I don't have any specific read-out as to how they're going. You won't be surprised.

QUESTION: But they will resume this afternoon?

MR. FOLEY: They are expected to resume this afternoon; that's what I was informed earlier.

QUESTION: As far as the North Korean delegation, do they have plans to go elsewhere?

MR. FOLEY: Well, there was some apparent plan on their part to travel to Iowa, today and possibly tomorrow. Let me get that for you here, because I have that information.

QUESTION: Iowa?

MR. FOLEY: Yes; let me explain. I will explain.

QUESTION: (Inaudible.)

(Laughter.)

MR. FOLEY: Very good, Charlie, it's not too early, is it?

We were aware of plans for the North Korean delegation to travel to Iowa to attend a Stanley Foundation program on conflict resolution. I would have to refer you to their delegation for details about their decision to change plans. It looks like, instead of going there, they may be staying here -- in New York. As I said, the negotiations may be resuming this afternoon.

We were prepared to have a break in the talks for a couple days, and to resume on Saturday, if they had gone to Iowa, or if they wind up going to Iowa.

QUESTION: Stanley Foundation program for conflict?

MR. FOLEY: For conflict resolution, yes.

QUESTION: Have you seen the remarks by the German Foreign Minister about the Lagrand case? This is the German-born person who was executed yesterday.

MR. FOLEY: I've not seen the remarks. I was told orally, briefly, about them. Walter Lagrand was executed by Arizona for murder during a 1982 bank robbery. The execution occurred only after he had exhausted numerous avenues of judicial review, in both the state and federal court systems. We respect the constitutional authority of Arizona to proceed with the execution, once all legal avenues had been pursued.

As you know, the Department of State yesterday transmitted a copy of the World Court order to the governor of Arizona, as requested by the Court. I would remind you, though, that the German suit in the International Court came at the very last moment of this process, and followed a very long process in the US legal system. The Court also, notably, issued its order without holding a hearing, or giving the United States an opportunity to respond. By the time we received the order, there was no reasonable opportunity for us to take any further action, except to transmit rapidly the copy to the governor of Arizona.

Germany has known about the consular notification issue for a number of years, but did not raise it with us until quite recently. We have not fully investigated the case, but the facts available to us suggest no reason to believe that the Lagrands did not receive due process, or that they were prejudiced by any

Annex MG 39

KEITH HIGHET, "THE EMPEROR'S NEW CLOTHES: DEATH ROW APPEALS TO THE WORLD COURT? THE BREARD CASE AS A MISCARRIAGE OF (INTERNATIONAL) JUSTICE", IN *ESSAYS* IN MEMORIAM *OF JUDGE JOSÉ MARIA RUDA* (FORTHCOMING)

Contribution by Keith Highet for the Book in memoriam for Judge José Maria Ruda

THE EMPEROR'S NEW CLOTHES

Death Row Appeals to the World Court?

The *Breard* Case As a Miscarriage of (International) Justice.

It is with sadness, still felt at a distance of some five years, that I write these words in memory of a friend and colleague who I dearly wish were still with us. I also feel much honor and deep gratitude at having been invited by the Committee to contribute to the book in memoriam of the late Judge Ruda.

As a diplomat, scholar, and judge, José Maria Ruda was long concerned with the impact of international law on our domestic polity, and the harmonization of the legal systems of the Americas. His service in the United Nations in its early years, his subsequent diplomatic service in connection with the Vienna Conventions on Consular Relations and the Law of Treaties, and his long experience as a judge of the International Court and its President -- all these stages in his professional career were concerned with the difficulties of integrating national systems and the international order, the undertakings of States in relation to international instruments and institutions, and the collective expectations of the international community. Indeed, in the *ELSI* case,[1] in which Judge Ruda served as President of the Chamber, issues of the interrelationship of the domestic laws and legal processes—and international obligations under a bilateral treaty between nation-States—were at the very forefront of the litigation.

Judge Ruda would, I know, have been most alert to the recent developments in relation to the Vienna Convention on Consular Relations.[2] These developments appear to have concerned one country in particular - the United States - and have involved the resources and national interest of a number of third States whose nationals have been convicted of capital crimes under the criminal laws of states of the United States and who have been put to death in spite of the fact that their trials and convictions proceeded without the form of consular advice and protection envisaged and provided by article 36 of the Vienna Convention. States that have been concerned in the protection of their nationals who have been convicted of murder and sentenced to die have included Mexico, Paraguay, Guatemala, Canada, and Germany.

The "consular notification" problem arises under article 36 of the Vienna Convention, which states inter alia that: "1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State: ... (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation .... " Importantly, article 36 continues, to say that "2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

Over the course of the past several years, significant cases have been decided in the United States concerning this provision of the Vienna Convention and the effect to be given to it in the course of criminal appeals from internal state criminal justice systems. Many constitutional difficulties are presented on the national plane when federal authorities attempt to reconcile their international obligations with their domestic constitutional architecture. This has been made all the more complicated by entirely predictable efforts, by the States whose nationals are to be put to death, to seek protective measures and redress from the International Court in the light of the pending execution of their nationals to whom protection under the Vienna Convention has been denied. Thus the machinery of the International Court has been placed in motion in relation to these matters. It has been frustrated at every turn.

Of the five high-profile U.S. cases in this line in the past two years, two—*Breard* (1998, a Paraguayan national)[3] and *LaGrand* (1999, a German citizen)[4]—have engendered literally last-minute appeals to the International Court from pending executions in states of the United States. The other three cases were: *Murphy* (1997, a Mexican),[5] *Villafuerte* (1998, Honduran),[6] and *Faulder* (1998, Canadian).[7] The International Court proceedings arose out of the *Breard* and *LaGrand* cases.[8] The International Court applications were filed only days before the death sentences were to be carried out; they were brought under the optional protocol to the Vienna Convention; each, quite logically, sought postponement or stay of execution of the convicted murderers in order to determine whether there should be retrials or other relief ordered based on the conceded non-compliance—by Virginia in Breard's case and by Arizona in LaGrand's—with the notification and consular assistance provisions of the Convention. In both cases the Court indicated a unanimous order *in ipsissimis verbis* to the effect that "The United States of America should take all measures at its disposal to ensure that [the condemned man] .... is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order ...."[9]

In addition to the proceedings before U.S. appeals courts, the United States Supreme Court and the International Court of Justice, it should be noted that Mexico has requested a general advisory opinion from the Inter-American Court of Human Rights in San José, Costa Rica.[10]

The general pattern of all of these cases is, stated simply, as follows: a foreign national is arrested for a capital offense and is tried in the courts of one of the states of the United States. The state authorities either do not know that he was a foreign national, or that as such he is subject to protective consultation with his consulate under article 36 of the Vienna Convention—or choose not to notify him of that right or to provide assistance. In each case there is a conviction, and a consequent sentence of death. Following this, lawyers for the condemned man discover the availability of the "Vienna Convention defense," and seek to assert it, in the state courts of the convicting state, or in the U.S. federal courts and in particular the U.S. Supreme Court, on a writ of *habeas corpus* or other relief intended to set aside the conviction and obtain a fresh trial at which, it is asserted, the defendant could have been made fully aware of his rights to consultation and in which, it is argued, he would have been more fully able to comprehend the charges against him and to formulate an effective defense. At the same time, in two of the cases applications were filed in The Hague with the International Court of Justice by the condemned men's countries, seeking adjudication of the issues presented by the Vienna Convention and the indication of provisional protective measures pending a decision.

The *Breard* case is the one where these issues have been most fully explored;[11] this case and its tributary matters[12] have already been subject to substantial and detailed exposition in the *The American Journal of International Law*,[13] where a concentrated selection of current commentary was promptly published in a single "Agora,"[14] in which however most efforts appear to have been concentrated on internal U.S. constitutional issues rather than on the larger, and more international, elements of the problem. In the more complete dossier attached to the *Breard* file there was also a letter from Secretary of State Albright addressed to the Governor of the state of Virginia, requesting him to "exercise his powers as Governor and stay the execution"; this letter however characterized the language of the Court's Order as being "non-binding."[15]

Since the effectiveness of the Vienna Convention on Consular Relations in 1967, the United States enacted a law entitled the "Antiterrorism and Effective Death Penalty Act of 1996[16] ("AEDPA") which requires, for federal appeals from state court convictions, "a substantial showing of the denial of a constitutional right."[17] In addition, the so-called "procedural default rule" governs federal appeals from state convictions and requires that failure to raise a claim on appeal within the state system will prevent it from being raised subsequently in the federal courts when such a claim could have been known to the defendant or his counsel during the pendency of the state proceedings.[18] In the last-moment *Breard* decision on habeas corpus, the United States Supreme Court wrote that "It is clear that Breard procedurally defaulted his claim, if any, under the Vienna Convention by failing to raise that claim in the state courts."[19] The Supreme Court added that " .... both Breard and Paraguay contend that Breard's Vienna Convention claim may be heard in federal court because the Convention is the 'supreme law of the land' [under the United States Constitution] and thus trumps the procedural default doctrine."[20] The Court rejected this argument as incorrect for two reasons.

The Court's first reason was (i) that the procedural rules of the United States would govern the matter, and that is an end of the matter. This dubious proposition was based on the Supreme Court's own interpretations of international law, and not those of an international tribunal—and resulted in a casual interpretation of the Vienna Convention that would appear to ignore the proviso in its article 36, paragraph 2, or to deprive it of meaning.[21] It is a mystery how the Court could have reconciled the requirement that "said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended" with what happened in the *Breard* case—or any of the other four cases related to it.

The second reason given by the Court was the "last in time rule" accepted in the United States. Its application in this situation was also illogical. The Court ruled (ii) that AEDPA—being later in time than the Vienna Convention's effectiveness for the United States by almost thirty years—rendered the consular notification provisions of the Convention null *pro tanto* under the U.S. doctrine that treaties may be superseded by subsequent statutes. Although this proposition is correct as a matter of internal United States constitutional law, it is considered by some[22] to be a misconstruction of the difference between non-self-executing and self-executing treaties—and, perhaps even more significantly, to beg the question as to what the meaning of "time" might be. If the "last in time" doctrine were correctly applied to the situation under review, the following would be the result: the Vienna Convention, embodying article 36 consular protection and consultation, came into effect for the United States in 1969; AEDPA in 1996." Breard's trial took place in 1993, and his appeal on habeas corpus grounds in 1996. His claim under the Convention may not have been asserted until 1996, but the denial of consultation and the injury to Breard (if there was one) had already occurred before AEDPA came into effect.

Yet as the Supreme Court pointed out, this was "before Breard filed his habeas [corpus] petition raising claims under the Vienna Convention .... [and] Breard's ability to obtain relief based on violations of the Vienna Convention is *subject to this subsequently-enacted rule*, just as any claim arising under the United States Constitution would be."[23] However, just what was this "subsequently-enacted rule"? It was not a rule that affected the Vienna Convention; it was only a rule affecting criminal appeals. As long as the rule did not purport to countermand or extinguish rights under the Vienna Convention, those rights continued in all vigor. What the rule did purport to do was to prevent Breard from asserting those rights in a criminal appeal—and it obviously succeeded at that, even if at the price of international responsibility—but it did not extinguish those rights as such. Thus the provisions of article 36 of the Vienna Convention remained untouched by AEDPA, and equally well by any rule of procedural convenience or economy such as the U.S. "procedural default" rule. It is not at all the same result as, for example, a specific congressional mandate to impose sugar tariffs where such tariffs had been otherwise fixed by a prior treaty,[24] or a congressional determination no longer to recognize Taiwan as "China" in spite of preexisting treaties. It is also well-settled in American law that inconsistency of a subsequent statute with a prior treaty is not to be presumed, and that if any meaning can be given which would not invalidate the treaty it is to be preferred.[25]

Since what the AEDPA did was to limit the substance of criminal appeals from state courts—not to limit the application of a treaty—the treaty was thus not overruled by the AEDPA. The treaty as such did not concern filing appeals or remedies for want of consular notification, and the language quoted by the Supreme Court from *Reid* v. *Covert* ("the statute *to the extent of conflict* renders the treaty null") does not work in this case; there was no "conflict" whose extent could be measured since the AEDPA did not pretend to *conflict* with the Vienna Convention, or *a fortiori* to render it null. Since neither the AEDPA nor the procedural default doctrine purported to affect rights under the Vienna Convention, the obligations of the United States under article 36 (1) (c) remained alive. The violation of that provision was a continuing violation, and should be recognized as being in existence *de novo* at all times up to the time when the appeal on habeas corpus grounds was made. The treaty obligations, remaining unaffected, would then—in turn—have "trumped" the AEDPA and the procedural default rule.

Moreover, from the point of view of contributory fault it was Virginia and the United States, not Breard, that created and maintained the legal quandary in which he found himself. It would not have been necessary for Breard to lodge his appeal in 1996 if, in 1993, the State of Virginia had performed its duty or the U.S. Government made sure that Virginia did so. Although the conviction and sentence may have been handed down in 1993, their effects were persisting and remained continuously in existence right up to Breard's final moments. Breard's rights guaranteed by the Convention were resurrected a *scintilla juris* after that trumping occurred, as long as it can be demonstrated that the AEDPA did not invalidate or revoke the convention—which can hardly be claimed. The question whether there could be a valid subsequent appeal incorporating assertion of rights from the earlier treaty that were not so contravened by the subsequent statute is therefore a complex one, and the answer would depend on the extent to which *that* right can be considered as being continuously in existence.

The U.S. Supreme Court was also of the view that article 36(2) of the Vienna Convention, indicating that rights thereunder "shall be exercised in conformity with the laws and regulations of the receiving State," can be read as saying that it is permissible under international law for the laws and regulations of the receiving State to make it impossible effectively to exercise those rights. It is incomprehensible how the Court could have reached that conclusion: in the very same paragraph, it set out the Convention language that should be dispositive of the very issue in the case—the article 36 (2) proviso that "said laws and regulations must enable *full effect to be given to the purposes for which the rights accorded under this article are intended.*" (Emphasis added.) The purposes of consular access rights are quite obviously to protect the criminal defendant nationals. To cut off the right of appeal on the basis of failure to raise the question of lack of consular access under the Convention in state court, when notification of such consular access was the duty of the arresting (receiving) State and was not in fact performed, is as absurd as Catch-22 but not in the least amusing. It is in fact the precise *opposite* of the performance of the duty to "enable full effect to be given to the purposes for which the rights accorded under this article are intended." In consequence, the language on which the Supreme

Court relied in the Convention was inapplicable to the *Breard* case, and the case was wrongly decided.

The Supreme Court seems also to have been of the view that it makes no difference if the negligence of the receiving State resulted in the fact that that the criminal defendant was not notified of his rights under the Convention. Over the past few years, severe restrictions have been placed on the right of convicted criminal defendants in the United States to pursue multiple appeals. However even if a criminal defendant, represented (as Breard was) by counsel, can correctly be said to have "waived" his right of consular notification, this has no effect on the non-compliance of the receiving State under the Convention and its responsibility under international law.

* *

These death penalty cases therefore present, in an unalloyed pure form, the conflict between the domestic legal order and the international system. The issues are clouded by the federal/state complexities which must of course complicate the matter, without which the matter would in every likelihood not have become such a pressing international issue today; it is essential to separate that which is not at issue from that which is.[26]

What is not at stake is the actual correctness of the determinations made by the U.S. courts—and in particular the Supreme Court. What is at issue is the reaction of the other organs of the State concerned—the executive power of the United States—to those inadequate decisions. Moreover, what is not at issue is whether the Supreme Court correctly interpreted U.S. domestic federal appeals practice; it may well have done, but that practice must also be measured against the less subjective lens of international scrutiny, and for reasons of internal illogic alone should be found wanting. Nor is there a question—although it is tempting to think that there is—about the correctness of the U.S. Supreme Court's evaluation of the effect of international legal obligations on U.S. domestic practice or the extent to which the U.S. Supreme Court is obliged to give effect to views or orders of the International Court. That subject can be more appropriately dealt with in much larger compass and in a different context; for the purposes of the present review it suffices to consider how correctly the Supreme Court actually decided matters with a view to determining again what *other* State action by, e.g., the White House, might have followed.

Also not at issue is the question whether a state governor was correct to ignore the

International Court, or whether he should have heeded a precatory letter addressed to him by the Secretary of State. Far more interesting is the issue whether the federal executive could or should have acted more forcefully[27] in light of, e.g., Virginia Governor Gilmore's determination not to postpone the execution of Breard.[28] Why did President Clinton not see fit to telephone the Governor of Virginia, to explain directly that a delay in execution would make possible an orderly resolution of the matter before the International Court of Justice?[29]

Likewise, *il ne s'agit pas* of the correctness of the U.S. Supreme Court's premise—or the conclusion of the Governor of Virginia, or the legal position of the U.S. Department of Justice or Department of State in their joint amicus curiae brief filed in the Breard v. Greene proceeding in the Supreme Court—that the provisional measures order of the International Court was not "binding."[30] This is a serious matter of more than academic interest, but the real issue from the point of view of the international lawyer remains whether *the position of the United States* as a party to the Vienna Convention and the Statute of the Court should have been otherwise. Internal disagreements are interesting but not decisive; what is decisive is that no one in the U.S. federal government or state governments appears to have found anything much wrong with this picture.

Finally, the acceptability of capital punishment is not at issue. The fact that it is only in use in a few modern States, and that the United States, China, and South Africa lead the rest of the world in this practice, is not relevant. It is not relevant that the great majority of States perceive the death sentence as being a basic violation of international human rights. It is only because of the persistence of capital punishment in America—a peculiar anachronism—that the United States has found itself in the difficult position of a non-complying ICJ respondent; the death row situation is the quintessential instance where an order indicating provisional measures from the ICJ could have been applied, but was not.

The key issues which emerge from consideration of these matters on the international plane are then the following. First is the obvious question whether a State can be a party without reservations to an international convention, and fulfil its obligations, if in fact its constituent or component federal entities can pick and choose what obligations to respect?[31] Related is the issue whether such a form of frustrated compliance can be converted into a valid position in international law that the State in question is thus prevented from complying, particularly in view of the unambiguous rule expressed in article 27 of the Vienna Convention on the Law of Treaties[32] and the fact that the United States did not append a "federal reservation" to its accession to the Vienna Convention on Consular Relations. Perhaps the present matter in essence raises the question of an "invisible reservation" for subsequent State action—or action by provincial or internal state authority—that is sought to relieve the State from an uncomfortable sensation that it might be in default on its international obligations.

A related issue is evidently whether "great powers" are in fact and indeed above the law. Would Paraguay have dared to take the same position that the United States Government took, had the shoe been on the other foot? One cannot help but raise the question—sorely tested in the years since the *Nicaragua* case—of the United States' commitment to international law in general and the International Court in particular.[33] To some extent—and this is matter of no small concern—the present problems can be viewed as stemming from a U.S. constitutional framework and history that, although excellent in many ways, is seriously out of harmony with the modern world in others. The role and international character of bilateral treaties in the 18th and 19th Centuries can hardly be compared to the role and character of multilateral conventions in the 20th Century, with almost two hundred signatories, and in particular conventions establishing international institutions with lives of their own.

It is not usual in the United States to suggest, even obliquely, that our Constitution may have one or two shortcomings. It reminds of the situation of the fable of the emperor's new clothes.[34] The United States possesses one of the only longest-lived democratic constitutions in the world—one that has lasted, with a relatively modest number of amendments, for over two centuries.[35] Although this is not the forum for discussion whether the constitution needs revision and clarification beyond piecemeal clarification and interpretation by the U.S. Supreme Court under *Marbury v. Madison*,[36] the present author believes that it sorely does—particularly in this cantankerous area of the relationship of the United States Government and its component state governments to the international treaty obligations of the United States.[37]

Part of the overarching problem presented here is also that, in the United States, "international law" is widely and frequently perceived as being "international law as applied by the United States"; it is as if it had no independent existence. This is a cultural bias reflected inter alia in simple conventions such as the nomenclature of the American Law Institute's "Restatement (Third) of the *Foreign Relations Law* of the United States."[38] It even appears in the excellent Agora in *The American Journal of International Law*,[39] where most of the points made by most of the authors related, most of the time, to internal U.S. administrative and constitutional practices, or to the views of the United States on such issues as, for example, whether provisional measures orders of the International Court are "binding"—not on what the international law on those questions might be.

It is therefore no surprise that the United States Supreme Court tripped over this very fence in the course of its *Breard v. Greene* opinion. The Supreme Court there said that it "should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such"[40]; what it should have said was that it "should give great respect and weight to the interpretation of an international treaty rendered by the International Court of Justice." The language used could be mistaken for condescension; yet it is the International Court that is surely the senior institution. It also creates an inference that the United States stands outside that "international court" or that it is somehow not party to the Statute. Whatever the Supreme Court's meaning may be, the International Court of Justice is hardly just "an international court with jurisdiction to interpret such": it is the principal judicial organ of the most significant international organization that the world has yet known, and of which the United States—although significant, is but one of many member States.

In oral argument in the *Fisheries Jurisdiction* case in June 1998, in the International Court, this writer stated that:

> "There is an interesting parallel ... to the dualistic conflict recently and so tragically illustrated by the Breard case (*Paraguay v. United States*) and the interaction between the Court's Order for provisional measures and the decision of the United States Supreme Court rejecting Mr. Breard's last appeal. In that case, the view expressed by the United States Supreme Court appears to be that the international rights and obligations of the United States *are appropriately to be measured by United States law*."[41]

In the Supreme Court decision, the key is to be found in the language quoted over note 40 *supra*. In that passage, the Supreme Court immediately followed the statement that "it has been recognized *in international law*" with citations—not to any international law authorities (such as the International Court)—but to three domestic U.S. cases decided by itself. Perhaps the Supreme Court intended to write "it has been recognized *that* in international law..." The existing language cannot however support the proposition that their conclusions "have been recognized *in* international law" any more than French or German municipal court decisions on matters arising under European unification can be characterized as "international" authority; they are not international authority, even if they speak of international matters

This fallacy in the Supreme Court opinion is reflected in its characterization of what are acceptable "international law" sources. The Supreme Court seems to have been oblivious of the fact that there were other "actors" or "obligations" at work. These included the duties owed by the United States (and Virginia) to the other signatories of the Vienna Convention, or the State of nationality of Breard himself. They also included the requirement to give "full effect ... to the purposes for which the rights accorded under this article are intended." Only under a purely U.S. interpretation of internal United States appellate and constitutional practice could one conclude that no U.S. law or regulation was being broken by failure to grant appeal to Breard and that, therefore, there was no non-compliance with the provisions of the Convention. The law applied by the Supreme Court to the validity of blocking criminal appeals does not answer the question whether or not the obligations of the United States under the Convention have been met. The Court has confused two quite different sets of rights and obligations, and resolved the issue by citing itself—instead of by looking outside the U.S. system.

Just as the Supreme Court should have correctly addressed the relationship of international treaty obligations to U.S. internal practice, so should the International Court bite the bullet on saying whether or not it considers that its orders for provisional measures of protection *pendente lite* are—if not technically "binding" under article 59 of the Statute—at least entitled to great respect under the Statute and the Charter. Why could this not be done in the next case involving an application for provisional relief? Sufficient reason must surely be that the Court has now recently endured two slaps in the face from the United States and its state authorities, and that this cannot merely be ignored. It is high time that the Court took a stronger position to protect the integrity of its own case-law without doing violence to its own precedents and to international law itself.[42]

At the heart of the international law problem, however, is the relationship between the United States itself and the International Court, "the principal judicial organ" of the organization of which it is obviously a highly significant part. Is it right or wrong for the U.S. Government to consider that an order for provisional measures by the Court, in a case where imminent death of the protected individual is concerned, is not "binding" and need not be complied with? In *Breard* the Department of Justice and the State Department took such a position.[43]

How could there be any *doubt* whether an order of provisional measures is at least tantamount to being "binding"? Although scholars have carefully attempted to crack the nut of the nature and effect of provisional measures, the legal arguments generally made appear somehow to be wide of the mark.[44] The real point is whether, in the large, the writ of the International Court counts for something or does not. Whether the order for provisional measures is technically, legally binding or not is not in fact the question. The real question is: what is the responsibility of States for making sure that the decisions of the Court are meaningful?

The most current reflections on this are contained in Professors Henkin's and Paust's pieces in the *American Journal*, with which this writer emphatically agrees.[45] However these analyses proceed more to deal with the *U.S.* view of what constitutes an international treaty obligation—and the justification *vel non* for that view—and less with what makes up that obligation to begin with. (An excellent review of the issues and authorities to 1987 is also provided in the *Restatement*.[46]) A few remarks on the international provenance and content of that obligation are therefore appropriate.[47]

The Statute of the Court is an integral part of the Charter of the United Nations[48] and as such is therefore *primus inter pares* in the contemporary universe of multilateral treaties. It goes without saying that any provision of the Statute, including its articles 41 (provisional measures) and 59 (binding force) should, together with those of article 92, paragraph 1 of the Charter,[49] be interpreted in accordance with the settled canon of treaty interpretation expressed in article 31 of the Vienna Convention on the Law of Treaties, to the effect that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Essentially, the reasoning advanced *against* provisional measures being "binding" rests on the proposition that an order indicating them under article 41 is not a "*decision* of the International Court of Justice" within the meaning of article 94 of the Charter or article 59 of the Statute,[50] and that States party to proceedings in the Court can essentially pick and choose as to whether they will render lip-service to an order of provisional measures or, as in many instances, virtually ignore them. Of course an order is not a decision or a final judgment. However what one is analyzing here is less the legal taxonomy of such an order, and more the effectiveness and deference that should be accorded to such an order by a party in a case.

However, when one turns to consider the object and purpose of article 41 of the Statute,[51] it is impossible to understand how "the respective rights of either party" could be "preserved" *unless* the parties give to a provisional measures order a deference that is the functional equivalent of compliance based on "binding" quality. Although it is elementary to recognize that an order for provisional measures is not and cannot be a decision or a judgment, on the other hand it is not credible to say that a provisional measure (referred to in the Statute as a measure "*pending* the final decision" in the case, and one which "*ought to be taken* to preserve the respective rights of either party") could in good faith be viewed in the context of contributing to that decision, or preserving those rights, unless it were respected *pro tanto* as if it were a preliminary part of a decision or judgment of the Court, even if not itself such a decision or judgment. The fact that article 94, paragraph 1 of the Charter is worded in terms of an undertaking "to comply with the decision" would seem to require compliance with all component parts of a decision, and would include any significant constituent element of the decision—in particular an element as significant as an essential protective order. How else could States possibly apply the Statute of the Court and its article 41 "in good faith in accordance with the ordinary meaning to be given to [its] terms ... in their context and in the light of its object and purpose"?

Moreover, it serves to recall that the third fundamental "Principle" of the United Nations, enunciated in article 2, paragraph 3 of the Charter, is that "All Members *shall* settle their international disputes by peaceful means in such a manner that international peace and security, *and justice*, are not endangered."[52] There is therefore an affirmative obligation on members to settle disputes in a manner where justice is not contravened; once a matter has been brought to the Court, the Court must function in accordance with its Statute to assist in that settlement; an integral part of the Statute is the inherent ability of the Court—or of any court—to issue interim orders specifying actions which "ought to be taken to preserve the respective rights of either party" in the course of reaching that settlement; and it cannot thus be argued that to deliberately ignore such a provisional measure of interim protection—or to treat them as optional or transitory—would be consistent with the object and purpose of the Charter (articles 2, paragraph 3 and 92, paragraph 1) or its integral part, the Statute of the Court (articles 41 and 59). It would distort the "ordinary meaning to be given to [their] terms ... in their context and in the light of [their] object and purpose." Sadly enough, it could also verge on being perceived as bad faith – particularly in instances where a State (such as the United States) has relied on obtaining precisely such measures in cases where it has been the applicant and another State the respondent.[53]

A related series of questions is of interest. Would these cases have emerged differently, either on the international plane or within the United States constitutional context, if any of the following had been true: (i) if the capital offense at issue had been a federal rather than a state offense, and if the prosecution and conviction had been under U.S. federal law – such as a federal espionage charge, or an accusation of treason or murder on a military post, or a pure federal capital crime – rather than under state law? (ii) If the conviction and sentence at issue had not been a death sentence, but were rather one where the convicted criminal had been condemned to serve a term of life imprisonment? (iii) If no recourse to the International Court of Justice had been sought?

As to (i), it must be obvious that placing the issue entirely on the federal level would have eliminated any residual arguments about internal constitutional proprieties. The same result would have been reached if, *ex hypothesi*, the State concerned (the United States) were not a federal State with internal state criminal justice systems but rather a unitary one. Then the United States would have had to respond directly to the issue of compatibility of execution of the death sentence by the United States, in the absence of consular protection of the defendant, with the unequivocally direct obligations of the United States rather than of one of its constituent federal states. Either a federal crime and conviction or a unitary framework would therefore have bought the U.S. treaty obligations into a direct and unarguable conflict with its conduct or lack of activity.

Likewise as to (ii), if these whole matters had not been circumscribed by the dramatic and logically "terminal" context of the death of the convicted criminal, these cases would surely have been resolved differently. If the human being subject to the whole proceeding is not in fact to be put to death, then he or she may live to see another day—whether or not in solitary confinement—and the international and internal juridical processes could have reasonably expected to reach a form of equilibrium. It would not have much mattered if the issue of a life-term prisoner were resolved in 1999 or in 2001—at least certainly not in the same sense as it matters in relation to the death of a convicted prisoner on a date certain.

The fact that the United States is among only a few States in the modern world that maintains capital punishment in the face of an overwhelming international human rights raises the stakes dramatically in relation to any provisional measures that the Court, for example, might indicate. The convicted criminal is either put to death at 3:00 P.M., or he is not, and the International Court will either have been ignored--or it will not. If the condemned man's sentence is executed, the matter is terminated and becomes, in the Anglo-Saxon parlance,[54] "moot." The international incorrectness of the situation, however, is not mooted.[55]

Finally, it is obvious that (iii) the proceedings brought before the International Court only cast the underlying problem into a different, and more serious, light and context. Instead of merely proceeding in the teeth of a contrary treaty—or of world opinion—the United States added repudiation of the Court for good measure.

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Conclusions almost suggest themselves. The international community has, in the next century, some education to perform—and in particular of those States who have become greater than ever and seem in some contexts to have lost their international legal compass. The International Court should—whenever it has an appropriate opportunity—clarify matters so that the *Breard* canard cannot be reproduced in the future; it is not fitting for the Court to be conservative or timid when there is no need for it to be so, and in fact a pressing need the other way. The United States, in its policy-making, should take heed of the proposition that unless there is a positive and solid political advantage to be gained or maintained, principles of international law and comity should be accorded great respect.[56]

Sir Winston Churchill once described the former Soviet Union as being "a riddle wrapped in a mystery inside an enigma."[57] The problem raised by these cases is more like a quandary wrapped in a dilemma inside a paradox. The quandary is the difficulty seemingly faced by the U.S. federal authorities in that they do not understand the consequences, and implications, of imposing standards and rules of U.S. domestic law to defeat treaty obligations. The dilemma is that it is naturally difficult for them to get out of the problem without reversing a string of cases that has already resulted in five deaths. The paradox is that even though recourse is had on an international plane to the mechanisms of the international legal system, and provisional measures of protection obtained and indicated by the World Court, one of the greatest constitutional tribunals in the modern world should seem to be quite indifferent to its sister institution and to the role and responsibility of the United States beyond its borders.

Perhaps one could even go further and state that the paradox is in turn to be found in a fatal incongruity of modern legal life: that the municipal and domestic systems proceed on their track, and the international system proceeds on another track, and that it is only for the weaker States and those who are dependent on integration of international law with domestic practice that the tracks are paralleled or caused to meet. For the superpowers of the world it is always easy, as the United States has done in these cases, to hide behind an unconcerned ignorance of what international law is.

Moreover, what is never considered in these kinds of cases is when a shield can become a sword (or vice versa). In the *Hostages in Iran* case,[58] the validity and effectiveness of provisional measures of protection were as important to the United States Government as they were annoying to it, only five years later, in the *Nicaragua* case.[59] What then are the interests to be balanced? Should the interest of the United States in protecting its nationals abroad be outweighed by its interest—or more properly the interest of the several states—in preserving the purity of the "procedural default rule" in the U.S. federal court system or even the "last in time rule" in the United States' constitutional practice?

Shortly after Breard was executed by Virginia, this author was told on impeccable authority that U.S. consular authorities around the world—but in Latin America in particular — were deeply concerned about the effect of the denial of consular protection and any remedy for that denial on U.S. citizens held in the prisons of foreign countries. Although one may be thankful that in all but a handful of those instances the death penalty issue cannot arise, there is nonetheless a serious issue presented as to the protection of U.S. nationals. Ironically the protection is not from State action or inaction failing to advise them of their consular consultation rights, but rather from the anger of other prison inmates who resent the fact that the U.S. criminals have received the benefit of consular assistance whereas they have not—and while some of their co-citizens have been put to death in the United States in spite of the lack of consular assistance in their defense. The American prisoners are being segregated from the general prison population, and so the concerns expressed in Secretary Albright's letter to Governor Gilmore appear[60] to have been borne out at least in part.

How would the United States feel if an American citizen were arrested and tried for a capital crime in a State, such as China or South Africa, where the death sentence is still applied, and if he or she had not been granted consular assistance under article 36 of the Convention? How would the United States Congress react to the situation if the absence of consular assistance had been due to the ineptitude or ignorance of the officials and local police of China or South Africa? What would the U.S. Department of State have to say if, in spite of these elements, Chinese or South African courts were then to reject an appeal for a new trial on the ground that internal Chinese or South African law provides only one bite at the apple and—although the accused may not have been aware of the issue at the time of trial—local counsel should have thought of it?

What more would the U.S. Administration say if it had filed an application with the International Court, and obtained indication of provisional measures requesting postponement of the execution until the issue of consular protection had been fully and properly determined, but then China or South Africa had simply disregarded the Court's order on the ground that it was not technically "legally binding" on China or South Africa? Finally, what would the reaction of the American press and public be if, after numerous entreaties from the United States, the accused were led to the firing-squad or the gallows without any serious attempt by Chinese or South African authorities to postpone the execution?

The answers to these questions are clear. What they prove beyond any doubt is that the United States appears now seriously to be embarked on a course where its own rules and standards can set aside cogent international values. Nothing can be more of a slap in the face to the writ of the International Court of Justice than to proceed to put a criminal to death in spite of an order of the Court that the execution should be postponed pending legal proceedings. In so doing the United States appears to be engaged in a form of selective amnesia, as it has forgotten the attitudes that would have governed it only two generations ago. Indeed, Secretary Albright in her letter to the Governor of Virginia got it right when she said that "the execution of Mr. Breard in the present circumstances could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention.... [and] ... could be seen as *a denial by the United States of the significance of international law and the Court's processes in its international relations* ...."[61]

To his great credit, Professor Henkin in his *Agora* article enunciated simply and directly that many ideas "need reminding"[62] to United States federal and state authorities. Forty years ago, President Dwight Eisenhower was quoted as saying that "It is better to lose a point now and then in an international tribunal and gain a world in which everyone lives at peace under the rule of law."[63] It is time for the authorities in the United States—all the way from the justices of the Supreme Court and the advisers of the Department of State to police officers and consular officials—to reexamine the type of commitment that the United States once had to the international process, and the kind of respect for that process that Eisenhower's apothegm conveys. One would hope that such a respect does not require a clear and present danger or an opponent such as the Soviet Union in 1959.

If the international system is to mean something today, and is to contain promise for our future, one would hope that judicial and administrative unilateralism of the type so clearly manifested by these cases can be repressed; with adequate light and reasoning shone on it, perhaps it will go happily into remission. Otherwise it is hard if not impossible to reach any conclusion other than that the U.S. authorities have assumed the role of a supersystem as well as of a superpower, and that this—even in instances where men are being put to death—is all that matters.

Keith Highet

NOTES

(N.B. I would prefer *footnotes* to end-notes, but am complying with the publishing instructions about manuscript submissions' avoiding footnotes in the text. — ***K.H.***)

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[1] *Elettronica Sicula, S.p.A. (ELSI)* (U.S. v. Italy), *I.C.J. Reports 1989*, p. 15. The author was privileged to plead as counsel and advocate in this matter before President Ruda and the Chamber.

[2] 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261. Done at Vienna on April 24, 1963; entered into force on March 19, 1967.

[3] Breard v. Virginia, 445 S.E.2d 670 (1994); Breard v. Virginia, 513 U.S. 971 (1994); Breard v. Netherland, 949 F.Supp. 1255 (E.D. Va. 1996), *aff'd*, 134 F.3d 615 (4th Cir. 1998); Breard v. Pruett, 134 F.3d 615 (4th Cir.), *cert. denied sub nom.* Breard v. Greene, 118 S.Ct. 1352, 140 L. Ed. 2d 529 (1998). A clear and careful exposition of these cases is given by Jonathan I. Charney and W. Michael Reisman, Editors in Chief of *The American Journal of International Law*, in "The Facts," contained in "Agora: *Breard*," 92 *American Journal of International Law*, No. 4 (October 1998), pp. 666-675, at pp. 666-712. And see also *Case concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998 (I.C.J. Communiqué 98/17).*

[4] Owing to the fact that Mr. LaGrand was executed only days before this writing, the sole written reports to hand are in the I.C.J. Communiqués and in the *International Herald Tribune* of 4 March 1999, at p. 12 ("Governor Rejects International Please for Doomed Killer") and 5 March, 1999, at pp. 1 and 3 ("Execution Angers Germany").

[5] Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997). See William C. Aceves, case note comment in "International Decisions," 92 *American Journal of International Law*, No. 1 (January 1998), p. 87.

[6] Villafuerte v. Stewart, 142 F.3d 1124 (9th Cir. 1998), at 1125. Mr. Villafuerte's last appeals were rejected by the U.S. Supreme Court on 21 April 1998 following a negative determination on commutation by the Arizona State Board of Executive Clemency. The Honduran Minister of Foreign Relations unsuccessfully sent a note to the Governor of Arizona requesting a stay in the execution for further investigation ("Cancillería Solicita Conmutación de Pena Para Compatriota en EUA," *La Prensa*, Tegucigalpa, 16 April 1998). The Honduran Government determined that there was insufficient time before Villafuerte's execution to bring a case against the United States before the International Court of Justice and declined to do so after the execution. (Interview with diplomatic sources.) (The author would like to acknowledge with gratitude the able assistance of Lic. Lorena Perez Villanueva in obtaining this and other background materials.)

[7] Faulder v. Texas, 611 S.W.2d 630; 1979 Tex. Crim. App. Lexis 1410 (April 18, 1979); Joseph Stanley Faulder v. Wayne Scott, Director (Faulder v. Scott), 81 F.3d 515 (5th Cir. 1996), at 517; Faulder v. Johnson, 81 F.3d 515 (5th Cir.), *cert.* denied, 117 S.Ct. 487 (1996), and Petition for Writ of Certiorari, Joseph Stanley Faulder v. Gary L. Johnson, U.S. Supreme Court, Case No. 98-7001, October Term, 1998, filed 24 November 1998, *cert.* denied, January 25, 1999. See also *Case*

concerning the Vienna Convention on Consular Relations (Germany v. United States of America), Provisional Measures, Order of 3 March 1999 (I.C.J. Communiqué 99/9).

[8] They were brought by Paraguay in the *Case concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998 (I.C.J. Communiqué 98/17)* and by Germany in *Case concerning the Vienna Convention on Consular Relations (Germany v. United States of America), Provisional Measures, Order of 3 March 1999 (I.C.J. Communiqué 99/9).*

[9] Order of 9 April 1998 in *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)*, p. 9; and Order of 3 March 1999 in *Case Concerning the Vienna Convention on Consular Relations (Germany v. United States of America)*, p. 5.

[10] December 9, 1997 Request for Advisory Opinion OC-16, Submitted by the Government of the United Mexican States; Written Observations of the United States of America, June 1, 1998; and Observations of the Inter-American Commission on Human Rights on the Request for Advisory Opinion OC-16 Before the Inter-American Court of Human Rights, April 30, 1998. (No opinion has yet been issued by the Court.)

[11] In the Murphy case (note 5 *supra*), the court stated that "'Treaties are one of the first sources that would be consulted by a reasonably diligent counsel representing a foreign national.'" 116 F.3d 97, 100. See also Aceves comment, *id.*, p. 88: "While Virginia officials had failed to notify Murphy of his rights under the Vienna Convention, this omission did not preclude his raising the claim on his own. 'The legal basis for the Vienna Convention claim could, as noted above, have been discovered upon a resonably diligent investigation by his attorney, and the factual predicate for that claim – that Murphy is a citizen of Mexico – was obviously within Murphy's knowledge.'"

[12] The interrelationship between the cases is obvious. In Republic of Paraguay v. Allen, 949 F.Supp. 1269 (E.D.Va. 1996), *aff'd*, 134 F.3d 622 (4th Cir.), *cert. denied sub nom.* Breard v. Greene, 118 S.Ct. 1352 (1998), Paraguay itself had commenced an action in the U.S. federal district court seeking relief for Breard and the violations of the Vienna Convention, but the court rejected subject matter jurisdiction "because the claimants were not alleging a 'continuing violation of federal law' and therefore could not being their claims within the exception to the immunity of states under the [U.S. Constitution's] Eleventh Amendment permitting prospective remedies." (Charney and Reisman, *op. cit. supra* note 3, p. 668.) Why is the violation of federal law (i.e. the Vienna Convention) not a "continuing violation," inasmuch as Breard had not been, and was still not being, accorded the consular consultation protections of article 36 of the Convention? See also Breard's response to accusation of his "procedural default" in not earlier raising the Vienna Convention defense, "that he had no reasonable basis for raising his Vienna Convention claim until April 1996 when the Fifth Circuit decided *Faulder* v. *Johnson* ..." (*ibid.*).

[13] "Agora: *Breard*," 92 *American Journal of International Law*, No. 4 (October 1998), pp. 666-712.

[14] To its substantial credit and that of the editors, this "Agora" includes, as well as the introductory factual exposition by Charney and Reisman, (*op. cit. supra* note 3, pp. 666-675), the following studies: Curtis A. Bradley and Jack L. Goldsmith, "The Abiding Relevance of Federalism to U.S. Foreign Relations," *id.* at pp. 675-679; Louis Henkin, "Provisional Measures, U.S. Treaty Obligations, and the States," *id.* at pp. 679-683; Carlos Manuel Vázquez, "*Breard* and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures," *id.* at pp. 683-691; Jordan J. Paust, "*Breard* and Treaty-Based Rights under the Consular Convention," *id.* at pp. 691-697; Lori Fisler Damrosch, "The Justiciability of Paraguay's Claim of Treaty Violation," *id.* at pp. 697-704; Frederic L. Kirgis, "*Zschernig v. Miller* and the *Breard* Matter," *id.* at pp. 704-708; and Anne-Marie

Slaughter, "Court to Court," *id.* at pp. 708-712. See also Peter Bekker and Keith Highet, "International Court of Justice Orders United States to Stay Execution of Paraguayan National in Virginia," *ASIL Insight*, April 1998, and James A. Deeken, "A New *Miranda* for Foreign Nationals? The Impact of Federalism on International Treaties that Place Affirmative Obligations on State Governments in the Wake of *Printz v. United States*," 31 *Vanderbilt Journal of Transnational Law No. 4, October 1998, pp. 997-1039.*

[15] Letter of April 13, 1998 from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia, reproduced in Charney and Reisman's Note, *op. cit. supra* note 3, at pp. 671-72

[16] Pub. L. No. 104-132, 110 Stat. 1214.

[17] See Aceves comment, *op. cit.* note 5 *supra*, p. 87.

[18] As stated by the Supreme Court of the United States in Breard v. Greene, *supra* note 3: "It is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas. Wainwright v. Sykes, 433 U.S. 72 (1977). Claims not so raised are considered defaulted. Ibid. By not asserting his Vienna Convention claim in state court, Breard failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia. Having failed to do so, he cannot raise a claim of violation of those rights now on federal habeas review." 140 L. Ed. 2d 529, at 537.

[19] *Ibid.*

[20] *Ibid.*

[21] "First, while we should give respectful consideration in the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, *it has been recognized in international law that, absent a clear and* express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State. See Sun Oil Co. v. Wortman, 486 U.S. 717, 723 (1988); Volkswagenswerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1988); Société National Industrielle Aérospatiale v. United States Dist. Court for Southern Dist. Of Iowa, 482 U.S. 522, 539 (1987). This proposition is embodied in the Vienna Convention itself, which provides that the rights expressed in the convention 'shall be exercised in conformity with the laws and regulations of the receiving State,' provided that 'said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.' Article 36(2), [1970] 21 U.S.T., at 101." (Emphasis added.)

[22] The Court stated that: "We have held 'that an Act of Congress ... is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, *the statute to the extent of conflict renders the treaty null.*' Reid v. Covert, 354 U.S. 1, 18, 1 L. Ed. 2d 1148, 77 S. Ct. 1222 (1957) (plurality opinion); see also Whitney v. Robertson, 124 U.S. 190, 194, 31 L. Ed. 386, 8 S. Ct. 456 (1888) (*holding that if a treaty and a federal statute conflict, 'the one last in date will control the other'*)." (Emphasis added.) See also the author's note on this subject, "The Irresistible Force and the Immovable Object: Reflections on the Recent PLO Controversies," in 29 *Virginia Journal of International Law* (Summer 1989), at p. 859.

[23] 140 L. Ed. 2d at 538; emphasis added.

[24] See e.g. Whitney v. Robertson, 124 U.S. 190, 194, 31 L. Ed. 386, 8 S. Ct. 456 (1888).

[25] See The Charming Betsy, 6 U.S. (2 Cranch) at p. 118 (1804). In the *Charming Betsy* the U.S. Supreme Court wrote that "It has also been observed that an act of Congress *ought never to be construed to violate the law of nations if any other possible construction remains*, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." (2 Cranch at p. 118; emphasis added.)

[26] Following the famous dictum of Marshal Foch at the beginning of each of his staff meetings during the Great War: "*Messieurs, de quoi s'agit-il?*"

[27] See for example Louis Henkin, "Provisional Measures, U.S. Treaty Obligations, and the States," *op. cit. supra* note 28, at pp. 679-683.

[28] Joined with the somewhat baffling statement that the people of the Commonwealth of Virginia had to be protected from the fear of crime, as if the issue were one of letting Breard out of prison entirely. See Commonwealth of Virginia, Office of the Governor, Press Office, Statement of April 14, 1998 by Governor Jim Gilmore Concerning the Execution of Angel Breard, reproduced by Charney and Reisman in their Note, *op. cit. supra* note 3, pp. 674-75.

[29] Professor Henkin, *op. cit. supra* at 681: "Since, in my view, the ICJ Order was legally binding, the President (the executive branch) was obligated to make stronger, 'mandatory' representations to the Governor of Virginia, stressing the legal obligation of the United States to stay the execution, and the constitutional duty of the Governor to act on that obligation. The Solicitor General should have called the attention of the U.S. Supreme Court to the legal obligation of the United States; the Supreme Court might have taken account of that obligation on its own motion. (If, to a majority of the Court, the posture of the proceedings before it did not provide an appropriate opportunity to order the stay of the execution, the Court might have invited the executive branch to invoke other judicial assistance by other proceedings.) And was there not available to the Attorney General, or to the Secretary of State, an independent proceeding in a federal court for an order to the Governor or other state officials to honor the U.S. treaty obligation and stay the execution?"

[30] See the relevant provisions of the *amicus* brief filed by the U.S. government, reproduced in the Agora in Charney and Reisman's Note, *op. cit. supra* note 3 at pp. 672-673. Of particular interest is the brief's comment that "the ICJ itself has never concluded that provisional measures are binding on the parties to a dispute. That court has indicated provisional measures in seven other cases of which we are aware; in most of those cases, the order indicating provisional measures was not regarded as binding *by the respondent*. ... *The ICJ did not, in any of the final decisions in those cases, suggest that the failure of the respondent to comply with the indication of provisional measures had violated the court's earlier order*." (*Op. cit.* at p. 672; emphasis added.) In fact, ironically enough, it was in the Court's Judgment of 24 May 1980 in the *Hostages* case (*United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3), a case of great importance to the United States, in which the Court specifically took note of, and criticized, the U.S. incursion by military units into Iranian territory on 24-25 April, saying that "The Court ... feels bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations; and to recall that in paragraph 47, 1 B, of its Order of 15 December 1979 the Court had indicated that no action was to be taken by either party which might aggravate the tension between the two countries." (*Id.* at p. 43, para. 93.) Thus the Court *has* clearly criticized non-compliance with an order for provisional measures—but such non-compliance was not that of the *respondent* (Iran), but rather the *applicant* (the United States). Although the Department of Justice and State Department amicus brief before the Supreme Court was technically accurate, it was also clearly misleading, if not disingenuous: one can only pause to wonder whether Roberts Owen, the then U.S. Legal Adviser and Agent, and (now President)

Stephen Schwebel, the then Deputy Agent and Counsel, would have hoped that the 1979 order for provisional measures were considered to be binding or the equivalent—and if it were not, why such an order had been sought from the Court in the first place?.

[31] See report of the meeting of the ASIL/CCIL Joint Panel on the Conduct of International Relations in Federal States, American Society of International Law *Proceedings of the 85th Annual Meeting, Washington, D.C., April 17-20, 1991*, pp. 132-151.

[32] "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." This raises a subsidiary issue of the extent it can be validly said that a State with an uninhibited "federal reservation" can—at least as long as it avoids international responsibility for its municipal actions—be genuinely said to be a party to the convention at all in the sense that its obligations can be increased or decreased at will by a conjunction of federal and internal provincial or state action. This recalls the famous separate and dissenting opinion of Judge Sir Hersch Lauterpacht in the *Interhandel* case (*I.C.J. Reports 1959*, p. 6, at pp. 95, 97-119) in which he concluded that a State possessed of a self-judging reservation to its optional clause declaration such as the"Connally reservation," could be viewed as not having accepted the obligations of the Statute; but it may however be distinguished from that lamentable situation inasmuch as the self-judging reservation goes to the issue of exercise of jurisdiction *by the Court* and, just as importantly, the exercise of the Court's powers under article 36, paragraph 6 of the Statute. This is therefore a matter quite fully distinguishable from other treaty escape-hatches, such as a federal state clause or (even) a "last in time" rule.

[33] See, by the present author, "Winning and Losing: the Commitment of the United States to the International Court – What Was It, What Is It, and Where Has It Gone?" in 1 *Transnational Law & Contemporary Problems*, pp. 157-200 (1991).

[34] The story being that the emperor had been tricked by his tailor into wearing "invisible robes"—and that, at a public levée, there was no one except a little child who was brave enough to be politically incorrect in saying to him that he was sorely deficient in the apparel department.

[35] See the present author's comments in article cited *supra* in note 22.

[36] Marbury v. Madison, 1 Cranch 137 (1803).

[37] When eminent constitutional scholars had to be marched up to Capitol Hill, in the fall of 1998, to give testimony on what the terms "high crimes and misdemeanors" might have meant in the impeachment provisions of Article II, Section IV of the U.S. Constitution, why is it not possible to take the bull by the horns and clarify the matter by a few selective amendments? Is it not possible to decide once and for all whether the Second Amendment right to "keep and bear arms" should prevent gun control, or whether hate statements and serious verbal threats are speech that is protected under the First Amendment? The United States federal courts and Supreme Court must otherwise continue to do their best to refine the meaning of these provisions into clarity episodically, as litigated cases of interpretation arise in the court system; yet to some extent at least it should be recognized that the method of judicial review alone is unsystematic and inefficient today, and leaves unnecessary ambiguity and anachronicity—and thus uncertainty—in place. (See comment by the author, *op. cit. supra* note 25, at p. 876.)

[38] American Law Institute, 2 vols. (1987); emphasis added.

[39] Fortunately, not "The American Journal of *the Foreign Relations Law of the United States*"!

[40] Breard v. Greene (1998), 140 L. Ed. 2d. 529, at p. 537.

[41] *Fisheries Jurisdiction (Spain v. Canada), Preliminary Objections*, Oral Argument of 10 June 1998 (emphasis added and footnotes omitted).

[42] See note 30 *supra*; see also H.W.A. Thirlway, "The Indication of Provisional Measures by the International Court of Justice," in Rudolf Bernhardt (ed.), *Interim Measures Indicated by International Courts* (Springer, Berlin 1994), p. 1, at pp. 28-32; and see also Note by Karin Oellers-Frahm, "Interim Measures of Protection," in 2 *Encyclopedia of Public International Law* (Elsevier, North-Holland 1995), at pp. 1027-1034, especially at pp. 1029-1030.

[43] See discussion under note 30 *supra*.

[44] As Hugh Thirlway has pointed out: "it is essential to be sure what we mean by binding: binding in what way?" (Thirlway, *op. cit. supra* note 42, p. 29)—and "a provisional measures Order can only be binding as a matter of treaty-law [as opposed to general international law]; the thesis that measures are binding rests solely on the premise that the Statute to which the States parties have acceded gives the Court power to indicate binding measures. ... because of the wording of the Statute and the *travaux préparatoires* it is very difficult to accept that premise that measures were intended by [the] Statute to be binding." (*Ibid.*)

[45] See Henkin, *op. cit. supra* note 14, pp. 680-681; Paust, *op. cit. supra*, *id.* at 685-686 and note 18.

[46] 2 *Restatement (Third) of the Foreign Relations Law of the United States*, § 903, Reporter's Note 6, at pp. 369-70 (American Law Institute, 1987) (also cited in the *amicus curiae* brief of the United States in *Breard v. Greene*, 13 April 1998, p. 49.)

[47] Although the scope of this article does not provide sufficient space to discuss the numerous and conflicting examples in this area, the author has in process a study on this particular subject—one which is fully worthy of further reflection, and one which may indeed provide a *clef de voûte* for a disciplined, and correct, analysis of the *res judicata* of International Court decisions and of the application thereto of the rule *pacta sunt servanda*.

[48] Charter, article 92.

[49] "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

[50] Stating that "The decision of the Court has no binding force except between the parties and in respect of that particular case," and consequently implying (conclusively) that the decision of the Court *does have* binding force between those parties, and in respect of that case.

[51] "1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which *ought to be taken to preserve the respective rights of either party*.

"2. Pending the *final decision*, notice of the measures suggested shall forthwith be given to the parties and to the Security Council." (Emphasis added.)

[52] Emphasis added.

[53] See for example *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 7, and *Judgment, I.C.J. Reports 1980*, p. 73; and

contrast *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984*, p. 169 and *Merits, Judgment, I.C.J. Reports 1986*, p. 14 (concerning the Nicaraguan complaint that the United States had refused to comply with the provisional measures indicated in 1984, see pp. 143-145, paras. 286-291, especially at p. 144, paras. 287-289).

[54] The word "moot" itself being anciently from the Anglo-Saxon "*mot*" and the Middle English "*mote*"; Skeat, W.W., *Etymological Dictionary of the English Language*, Oxford, rev. ed. 1958, pp. 384-385.

[55] Paraguay requested that the case be removed from the Court's list seven months after Breard's execution: *Order of 10 November 1998; ICJ Press Communiqué 98/36*, 11 November 1998.

[56] For a clear appeal to and for comity, see Anne-Marie Slaughter, "Court to Court," *op. cit. supra* note 14, at pp. 708-712.

[57] As quoted in "The Kurils Quandary," contribution to the *Liber Amicorum for Eduardo Jiménez De Aréchaga* (Fundación de Cultura Universitaria, Montevideo, Uruguay, 1994), pp. 601-37.

[58] *I.C.J. Reports 1980*, p. 3; see discussion *supra* note 30.

[59] Citations in note 54 *supra*.

[60] "I am particularly concerned about the possible negative consequences for the many U.S. citizens who live and travel abroad. ... The immediate execution of Mr. Breard in the face of the [International] Court's April 9 [Order for Provisional Measures] ... could ... limit our ability to ensure that Americans are protected when living or traveling abroad." Cited in the introductory factual exposition to the Agora in the Note by Charney and Reisman, *op. cit.* note 3, pp. 666 and 672.

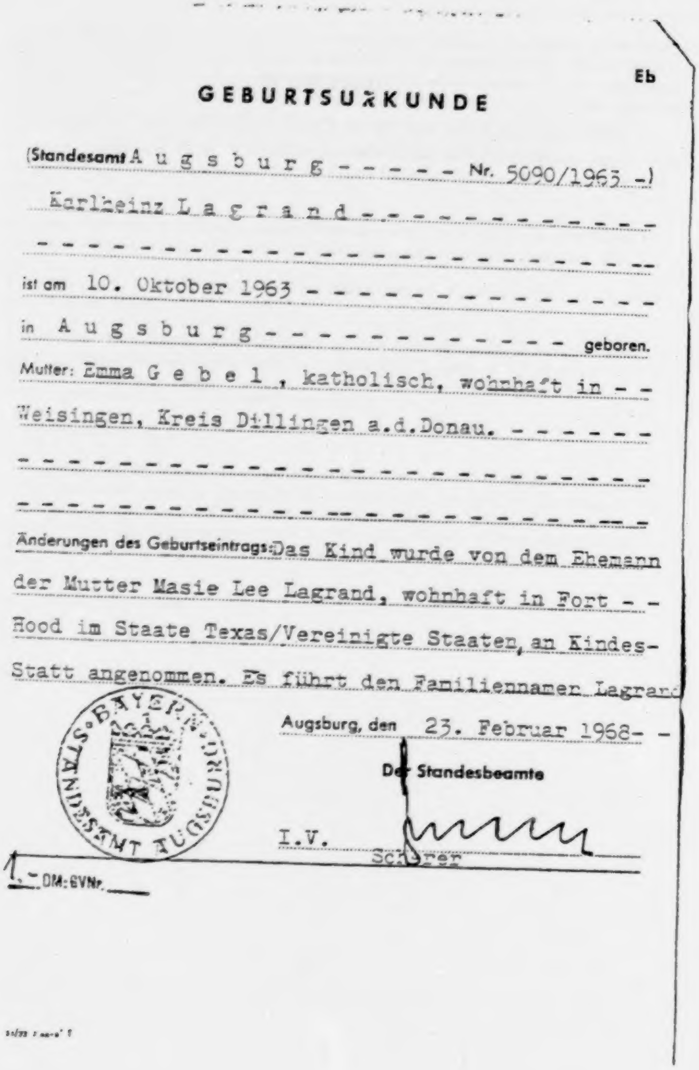
[61] *Id.*, p. 672; emphasis added.

[62] *Op. cit. supra* note 27 at p. 683.

[63] *Op. cit. supra* note 33 at p. 158.

Annex MG 40

CERTIFICATES OF BIRTH OF KARL AND WALTER LAGRAND. PASSPORT OF EMMA LAGRAND, NÉE GEBEL



Eb

GEBURTSURKUNDE

(Standesamt Augsburg - - - - - Nr. 5090/1963 -)

Karlheinz Lagrand - - - - - - - - - - - -

- -

ist am 10. Oktober 1963 - - - - - - - - - - - - -

in Augsburg - - - - - - - - - - - - - geboren.

Mutter: Emma Gebel, katholisch, wohnhaft in - - Weisingen, Kreis Dillingen a.d.Donau. - - - - - -

- -

- -

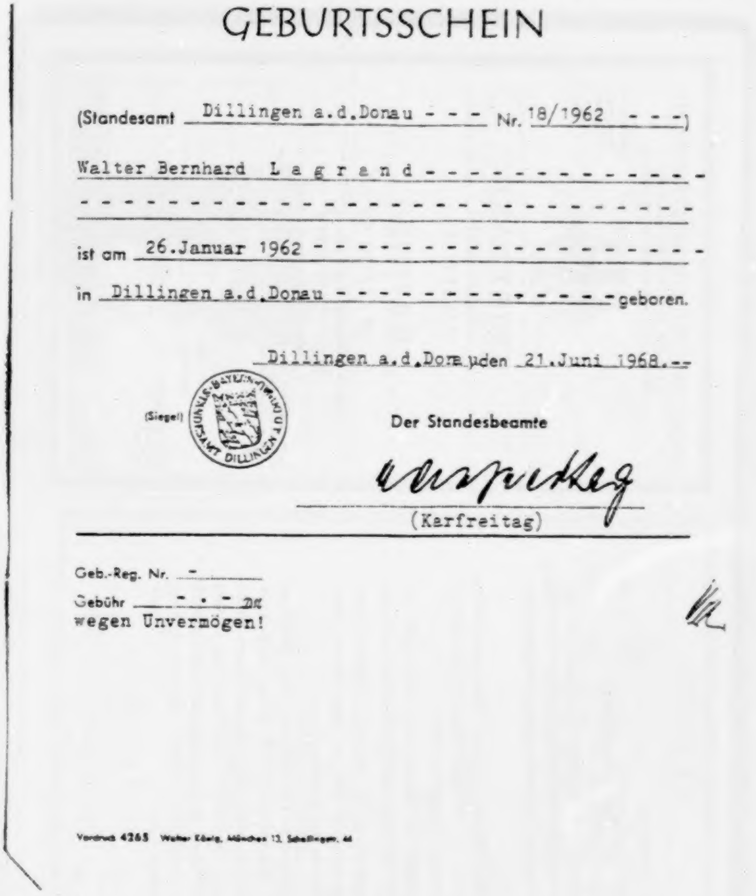
Änderungen des Geburtseintrags: Das Kind wurde von dem Ehemann der Mutter Masie Lee Lagrand, wohnhaft in Fort - - Hood im Staate Texas/Vereinigte Staaten, an Kindes-Statt angenommen. Es führt den Familiennamen Lagran

Augsburg, den 23. Februar 1968- -

Der Standesbeamte

I.V. Scherer

1,- DM: GVNr.



GEBURTSSCHEIN

(Standesamt Dillingen a.d.Donau - - - Nr. 18/1962 - - -)

Walter Bernhard Lagrand - - - - - - - - - - - - - -
- -

ist am 26.Januar 1962 - - - - - - - - - - - - - - - - - -

in Dillingen a.d.Donau - - - - - - - - - - - - - geboren.

Dillingen a.d.Donau, den 21.Juni 1968.--

(Siegel)

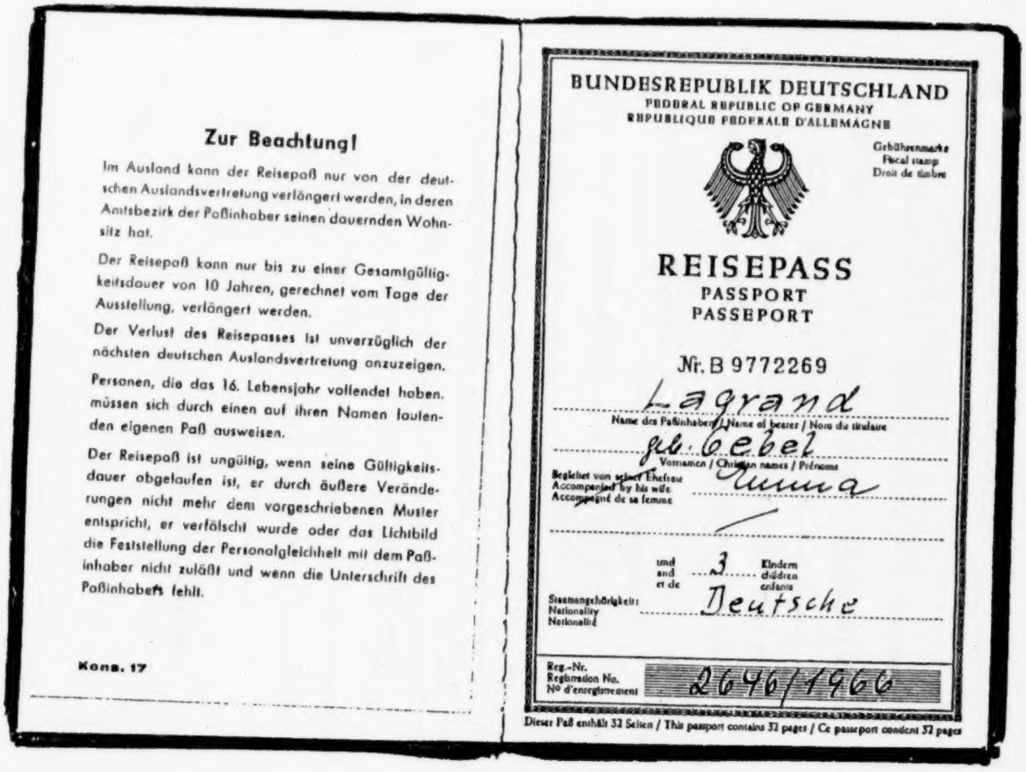
Der Standesbeamte

(Karfreitag)

Geb.-Reg. Nr. -

Gebühr -.- DM
wegen Unvermögen!

Vordruck 4265 Walter König, München 13, Schellingstr. 44



Zur Beachtung!

Im Ausland kann der Reisepaß nur von der deutschen Auslandsvertretung verlängert werden, in deren Amtsbezirk der Paßinhaber seinen dauernden Wohnsitz hat.

Der Reisepaß kann nur bis zu einer Gesamtgültigkeitsdauer von 10 Jahren, gerechnet vom Tage der Ausstellung, verlängert werden.

Der Verlust des Reisepasses ist unverzüglich der nächsten deutschen Auslandsvertretung anzuzeigen.

Personen, die das 16. Lebensjahr vollendet haben, müssen sich durch einen auf ihren Namen lautenden eigenen Paß ausweisen.

Der Reisepaß ist ungültig, wenn seine Gültigkeitsdauer abgelaufen ist, er durch äußere Veränderungen nicht mehr dem vorgeschriebenen Muster entspricht, er verfälscht wurde oder das Lichtbild die Feststellung der Personalgleichheit mit dem Paßinhaber nicht zuläßt und wenn die Unterschrift des Paßinhabers fehlt.

Kons. 17

BUNDESREPUBLIK DEUTSCHLAND
FEDERAL REPUBLIC OF GERMANY
REPUBLIQUE FEDERALE D'ALLEMAGNE

Gebührenmarke
Fiscal stamp
Droit de timbre

REISEPASS
PASSPORT
PASSEPORT

Nr. B 9772269

Lagrand
Name des Paßinhabers / Name of bearer / Nom du titulaire

geb. Gebel
Vornamen / Christian names / Prénoms

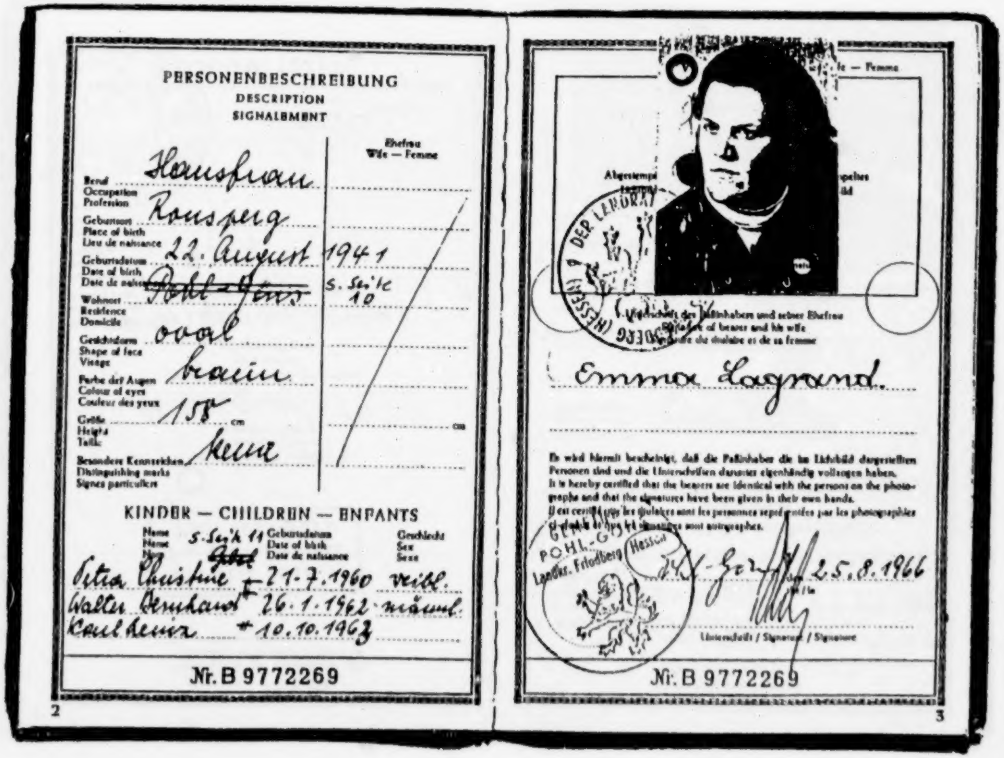
Begleitet von seiner Ehefrau
Accompanied by his wife
Accompagné de sa femme
Emma

und / and / et de 3 Kindern / children / enfants

Staatsangehörigkeit / Nationality / Nationalité Deutsche

Reg.-Nr. / Registration No. / N° d'enregistrement 2646/1966

Dieser Paß enthält 32 Seiten / This passport contains 32 pages / Ce passeport contient 32 pages



PERSONENBESCHREIBUNG
DESCRIPTION
SIGNALEMENT

Ehefrau
Wife — Femme

Beruf / Occupation / Profession: Hausfrau

Geburtsort / Place of birth / Lieu de naissance: Rausperg

Geburtsdatum / Date of birth / Date de naissance: 22. August 1941

Wohnort / Residence / Domicile: ~~Pohl-Göns~~ s. Seite 10

Gesichtsform / Shape of face / Visage: oval

Farbe der Augen / Colour of eyes / Couleur des yeux: braun

Größe / Height / Taille: 158 cm

Besondere Kennzeichen / Distinguishing marks / Signes particuliers: keine

KINDER — CHILDREN — ENFANTS

Name / Name / Nom s. Seite 11	Geburtsdatum / Date of birth / Date de naissance	Geschlecht / Sex / Sexe
Petra Christine	21-7.1960	weibl.
Walter Bernhard	26.1.1962	männl.
Karl Heinz	+10.10.1963	

Nr. B 9772269

2

Unterschrift des Paßinhabers und seiner Ehefrau
Signature of bearer and his wife
Signature du titulaire et de sa femme

Emma Lagrand.

Es wird hiermit bescheinigt, daß die Paßinhaber die im Lichtbild dargestellten Personen sind und die Unterschriften darunter eigenhändig vollzogen haben.
It is hereby certified that the bearers are identical with the persons on the photographs and that the signatures have been given in their own hands.
Il est certifié que les titulaires sont les personnes représentées par les photographies et que les signatures sont autographes.

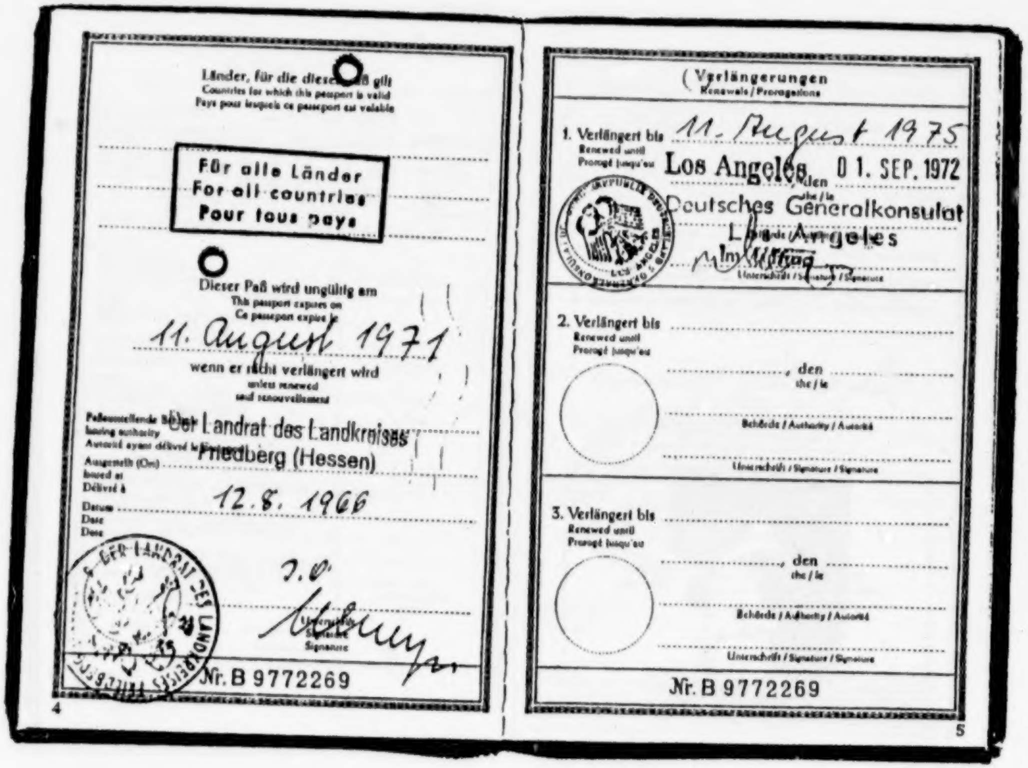
Gemeinde Pohl-Göns Landkr. Friedberg (Hessen)

[illegible]-Göns, 25.8.1966

Unterschrift / Signature / Signature

Nr. B 9772269

3



Länder, für die diese[illegible]ß gilt
Countries for which this passport is valid
Pays pour lesquels ce passeport est valable

Für alle Länder
For all countries
Pour tous pays

Dieser Paß wird ungültig am
This passport expires on
Ce passeport expire le
11. August 1971
wenn er nicht verlängert wird
unless renewed
sauf renouvellement

Paßausstellende Behörde
Issuing authority
Autorité ayant délivré le passeport
Der Landrat des Landkreises

Ausgestellt (Ort)
Issued at
Délivré à
Friedberg (Hessen)

Datum
Date
Date
12.8.1966

I.A.

Unterschrift
Signature

Nr. B 9772269

4

(Verlängerungen
Renewals / Prorogations

1. Verlängert bis
Renewed until
Prorogé jusqu'au
11. August 1975

Los Angeles, den 01. SEP. 1972
the / le

Deutsches Generalkonsulat
Los Angeles
Im Auftrag

Unterschrift / Signature / Signature

2. Verlängert bis
Renewed until
Prorogé jusqu'au

, den
the / le

Behörde / Authority / Autorité

Unterschrift / Signature / Signature

3. Verlängert bis
Renewed until
Prorogé jusqu'au

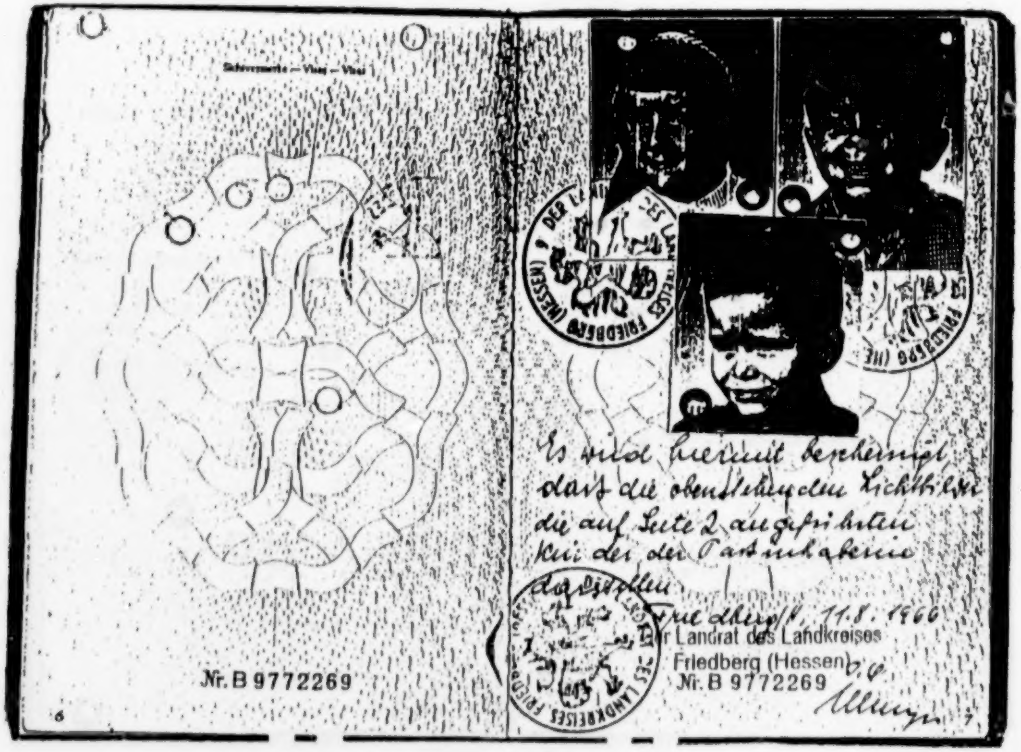
, den
the / le

Behörde / Authority / Autorité

Unterschrift / Signature / Signature

Nr. B 9772269

5



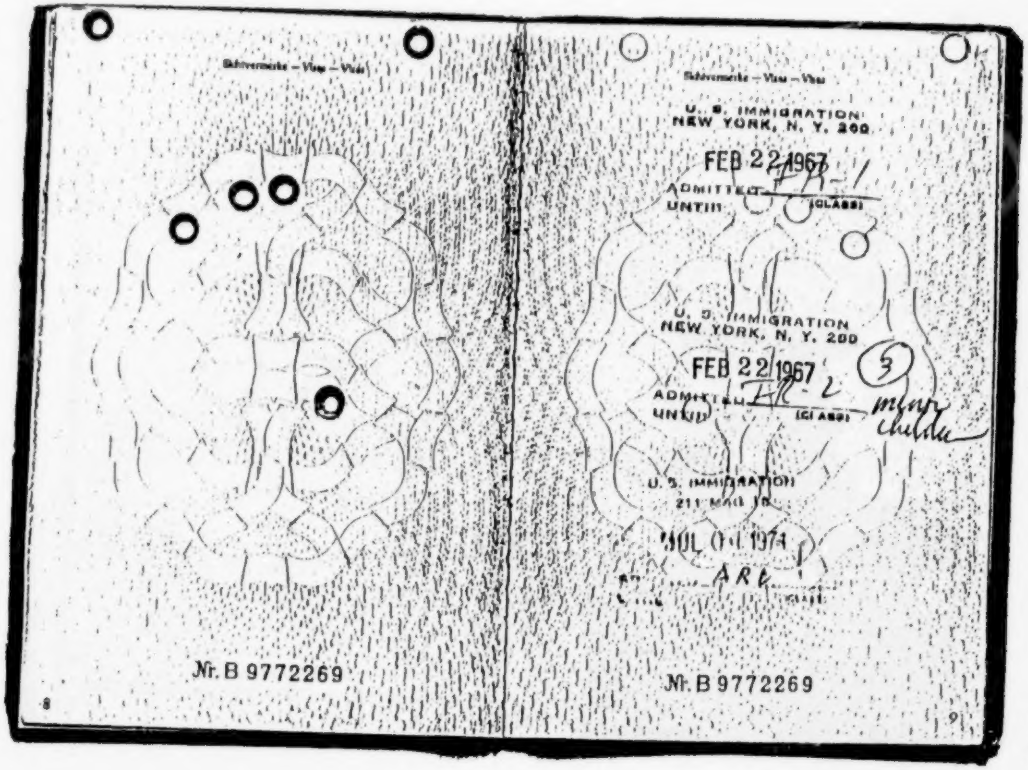
Sichtvermerke — Visas — Visti

Nr. B 9772269

6

Es wird hiermit bescheinigt
dass die obenstehenden Lichtbilder
die auf Seite 2 aufgeführten
Kinder des Passinhabers
darstellen
Friedberg/H., 11.8.1966
Der Landrat des Landkreises
Friedberg (Hessen) I.A.
Nr. B 9772269

7



Sichtvermerke — Visa — Visas

Nr. B 9772269

8

Sichtvermerke — Visa — Visas

U. S. IMMIGRATION
NEW YORK, N. Y. 200
FEB 22 1967
ADMITTED FR-1
UNTIL (CLASS)

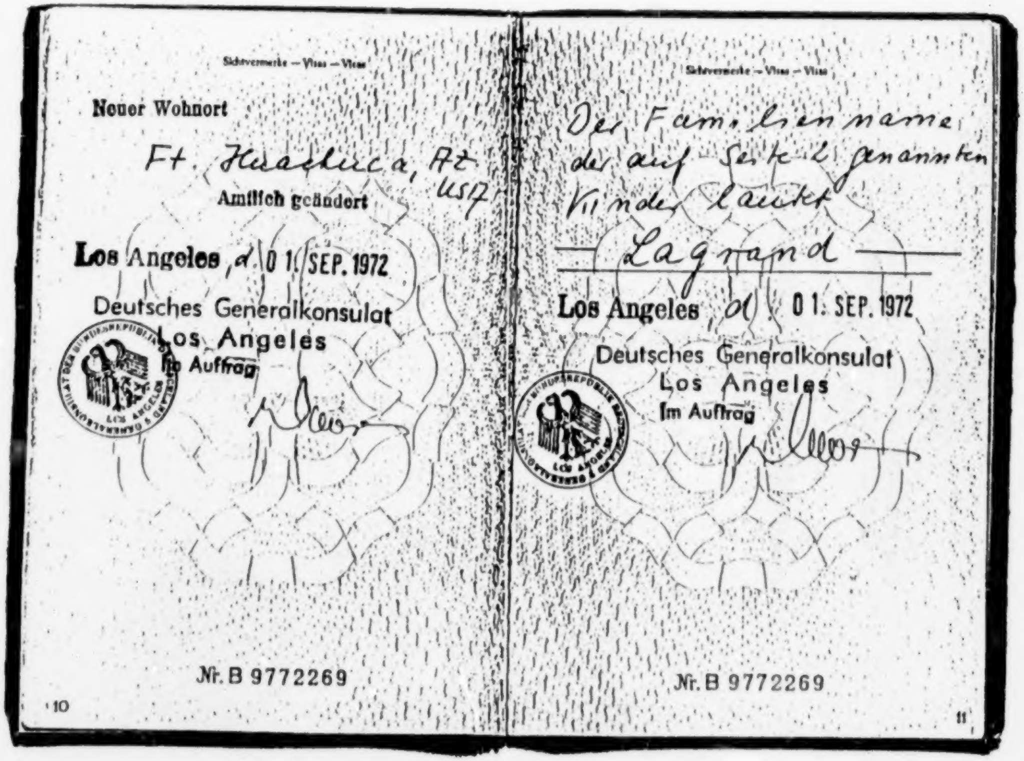
U. S. IMMIGRATION
NEW YORK, N. Y. 200
FEB 22 1967
ADMITTED FR-2
UNTIL (CLASS)

③ minor children

U. S. IMMIGRATION
211
JUL 01 1974
ARC
(CLASS)

Nr. B 9772269

9



Sichtvermerke — Visas — Visas

Neuer Wohnort

Ft. Huachuca, Az USA

Amtlich geändert

Los Angeles, d. 01. SEP. 1972

Deutsches Generalkonsulat
Los Angeles
Im Auftrag

Nr. B 9772269

10

Sichtvermerke — Visas — Visas

Der Familienname
der auf Seite 2 genannten
Kinder lautet
Lagrand

Los Angeles d. 01. SEP. 1972

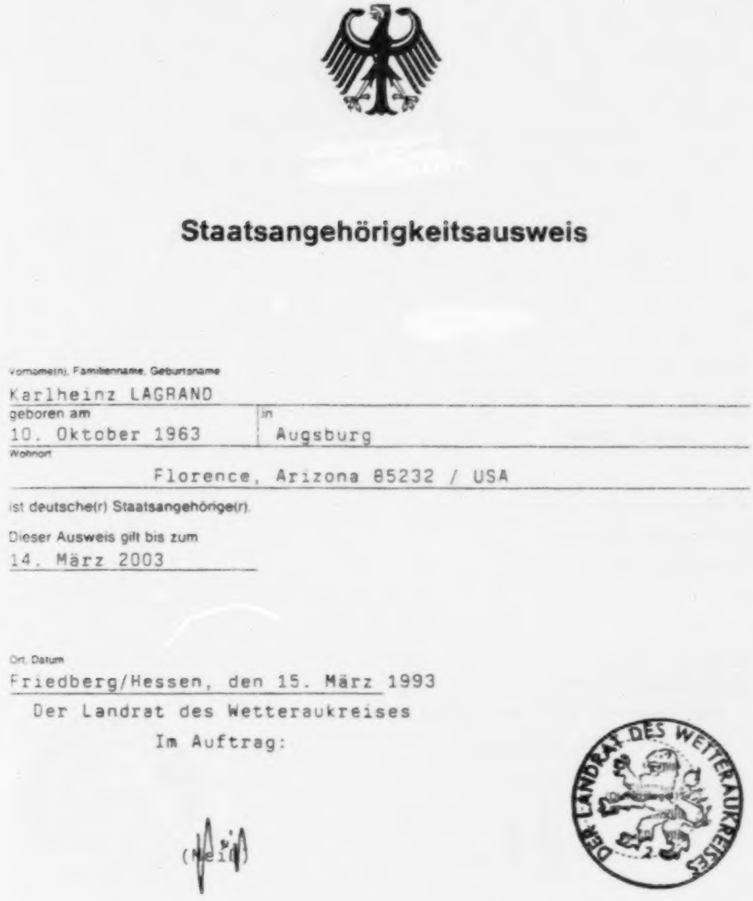
Deutsches Generalkonsulat
Los Angeles
Im Auftrag

Nr. B 9772269

11

Annex MG 41

CERTIFICATES OF GERMAN CITIZENSHIP
OF KARL AND WALTER LAGRAND
(15 MARCH 1993)



Staatsangehörigkeitsausweis

Vorname(n), Familienname, Geburtsname
Karlheinz LAGRAND

geboren am
10. Oktober 1963

in
Augsburg

Wohnort
Florence, Arizona 85232 / USA

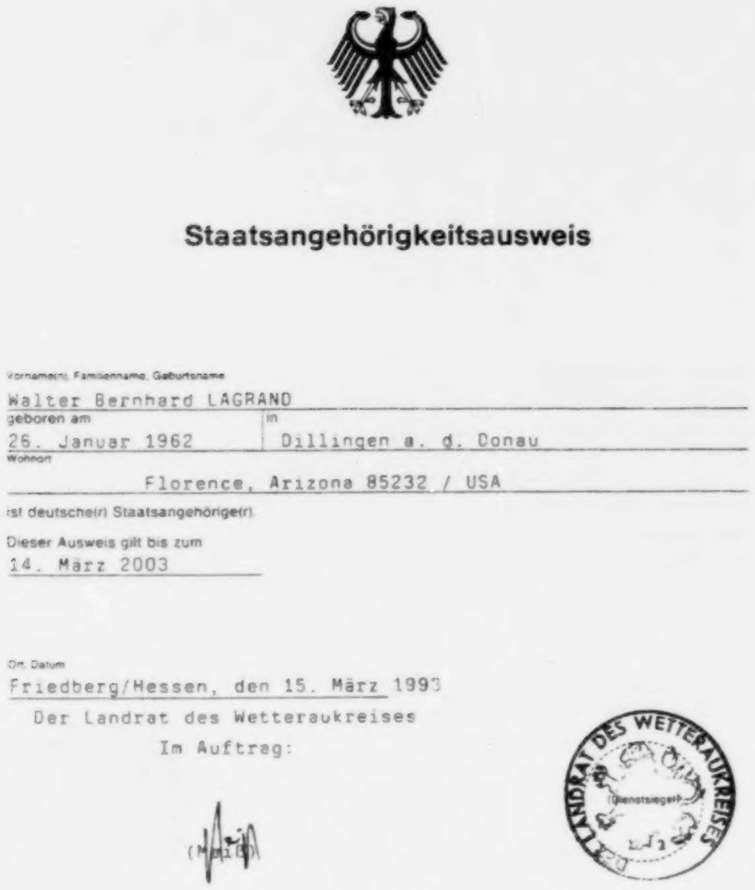
ist deutsche(r) Staatsangehörige(r).

Dieser Ausweis gilt bis zum
14. März 2003

Ort, Datum
Friedberg/Hessen, den 15. März 1993

Der Landrat des Wetteraukreises
Im Auftrag:

(Heil)



Staatsangehörigkeitsausweis

Vorname(n), Familienname, Geburtsname
Walter Bernhard LAGRAND

geboren am	in
26. Januar 1962	Dillingen a. d. Donau

Wohnort
Florence, Arizona 85232 / USA

ist deutsche(r) Staatsangehörige(r).

Dieser Ausweis gilt bis zum
14. Marz 2003

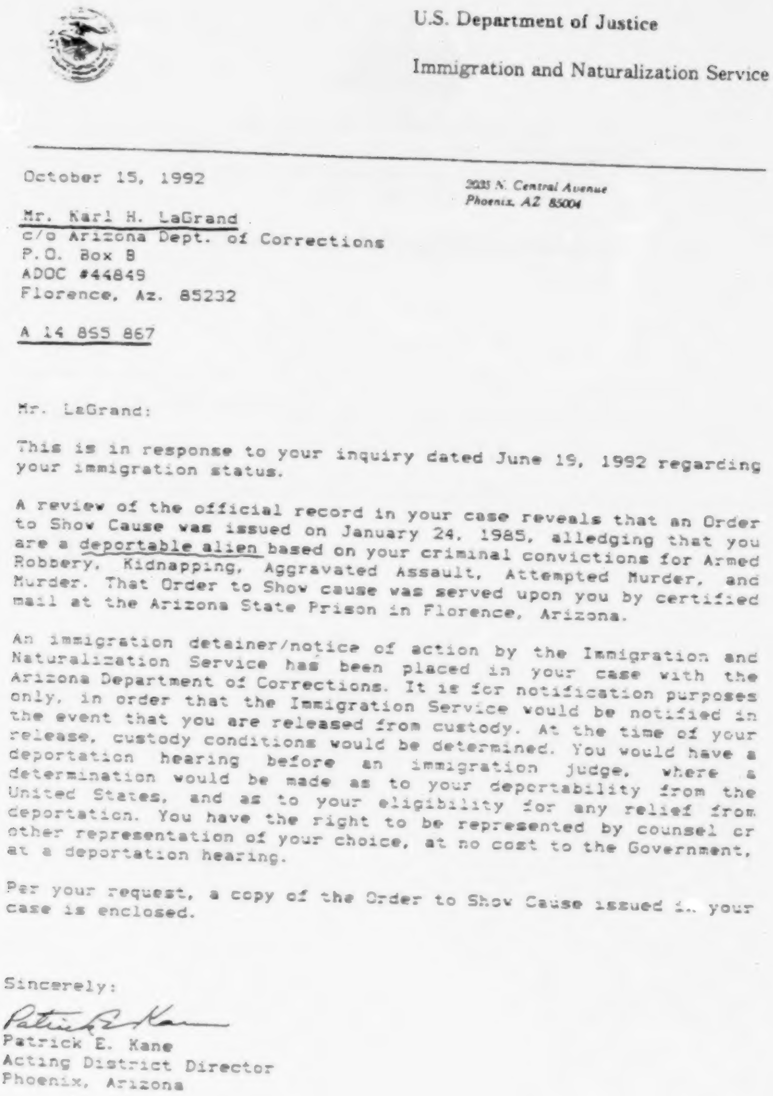
Ort, Datum
Friedberg/Hessen, den 15. März 1993

Der Landrat des Wetteraukreises
Im Auftrag:

(Maib)

Annex MG 42

U.S. DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,
LETTERS TO KARL AND WALTER LAGRAND
(15 OCTOBER 1992)



U.S. Department of Justice

Immigration and Naturalization Service

2035 N. Central Avenue
Phoenix, AZ 85004

October 15, 1992

Mr. Karl H. LaGrand
c/o Arizona Dept. of Corrections
P.O. Box B
ADOC #44849
Florence, Az. 85232

A 14 855 867

Mr. LaGrand:

This is in response to your inquiry dated June 19, 1992 regarding your immigration status.

A review of the official record in your case reveals that an Order to Show Cause was issued on January 24, 1985, alledging that you are a deportable alien based on your criminal convictions for Armed Robbery, Kidnapping, Aggravated Assault, Attempted Murder, and Murder. That Order to Show cause was served upon you by certified mail at the Arizona State Prison in Florence, Arizona.

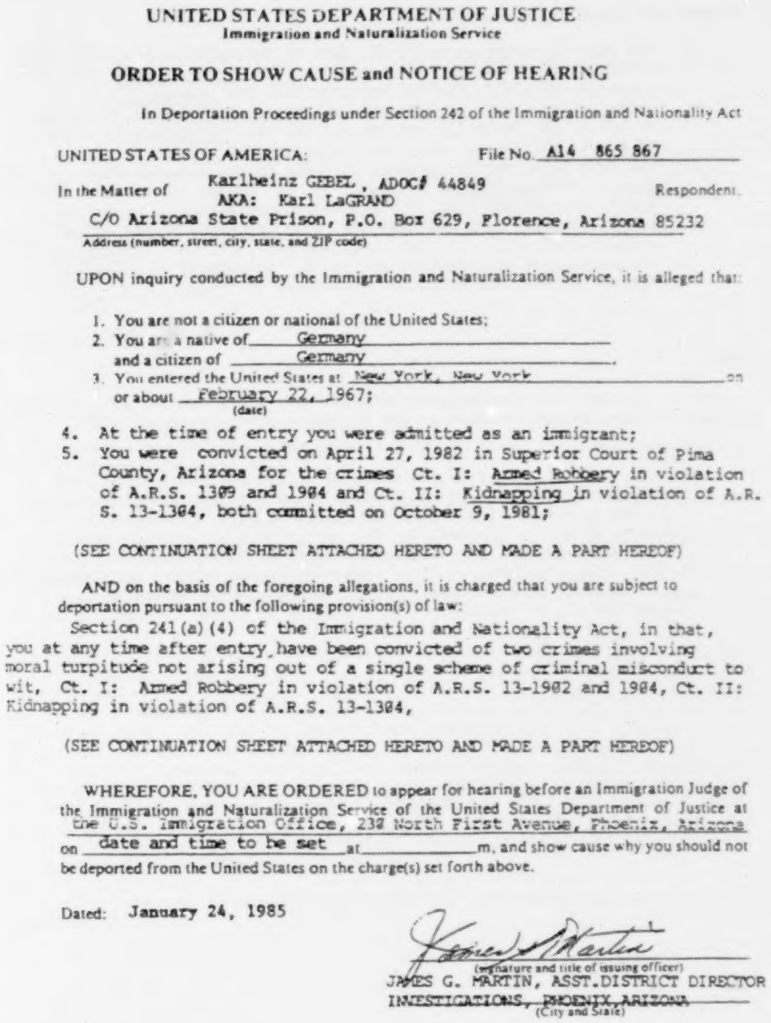
An immigration detainer/notice of action by the Immigration and Naturalization Service has been placed in your case with the Arizona Department of Corrections. It is for notification purposes only, in order that the Immigration Service would be notified in the event that you are released from custody. At the time of your release, custody conditions would be determined. You would have a deportation hearing before an immigration judge, where a determination would be made as to your deportability from the United States, and as to your eligibility for any relief from deportation. You have the right to be represented by counsel or other representation of your choice, at no cost to the Government, at a deportation hearing.

Per your request, a copy of the Order to Show Cause issued in your case is enclosed.

Sincerely:

Patrick E. Kane

Patrick E. Kane
Acting District Director
Phoenix, Arizona



UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

ORDER TO SHOW CAUSE and NOTICE OF HEARING

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA: File No. A14 865 867

In the Matter of Karlheinz GEBEL, ADOC# 44849 Respondent.
AKA: Karl LaGRAND
C/O Arizona State Prison, P.O. Box 629, Florence, Arizona 85232
Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Germany
and a citizen of Germany.
3. You entered the United States at New York, New York on or about February 22, 1967;
(date)
4. At the time of entry you were admitted as an immigrant;
5. You were convicted on April 27, 1982 in Superior Court of Pima County, Arizona for the crimes Ct. I: Armed Robbery in violation of A.R.S. 1309 and 1904 and Ct. II: Kidnapping in violation of A.R.S. 13-1304, both committed on October 9, 1981;

(SEE CONTINUATION SHEET ATTACHED HERETO AND MADE A PART HEREOF)

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(4) of the Immigration and Nationality Act, in that, you at any time after entry have been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct to wit, Ct. I: Armed Robbery in violation of A.R.S. 13-1902 and 1904, Ct. II: Kidnapping in violation of A.R.S. 13-1304,

(SEE CONTINUATION SHEET ATTACHED HERETO AND MADE A PART HEREOF)

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at the U.S. Immigration Office, 230 North First Avenue, Phoenix, Arizona on date and time to be set at ______ m, and show cause why you should not be deported from the United States on the charge(s) set forth above.

Dated: January 24, 1985

(signature and title of issuing officer)
JAMES G. MARTIN, ASST.DISTRICT DIRECTOR
INVESTIGATIONS, PHOENIX,ARIZONA
(City and State)

Allegations Con't

6. You were convicted on April 27, 1981 in the Superior Court Pima County, Arizona for the crimes of Ct. III: Armed Robbery in violation of A.R.S. 13-1902 and 1904, Ct. IV: Kidnapping in violation of A.R.S. 13-1304, Ct. V: Aggravated Assault in violation of A.R.S. 13-1204(A)(2) and (B) and Ct. VI: Kidnapping in violation of A.R.S. 13-1304 all committed on October 12, 1981;
7. You were convicted on December 14, 1984 in the Superior Court of Pima County, Arizona for the crimes of Ct. I: Murder in violation of A.R.S. 13-1101 and 1105, Ct. II: Attempted Murder in violation of A.R.S. 13-1001, 1101 and 1105, Ct. III: Attempted Armed Robbery in violation of A.R.S. 13-1001, 1902 and 1904, Ct. IV: Kidnapping in violation of A.R.S. 13-1304 and Ct. V: Kidnapping in violation of A.R.S. 13-1304, all committed on January 7, 1982.

Con't

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Ct. III: Armed Robbery in violation of A.R.S. 13-1902 and 1904, Ct. IV: Kidnapping in violation of A.R.S. 13-1304, Ct. V: Aggravated Assault in violation of A.R.S. 13-1204(A)(2) and (B), Ct. VI: Kidnapping in violation of A.R.S. 13-1304, Ct. I: Murder in violation of A.R.S. 13-1101 and 1105, Ct. II: Attempted Murder in violation of A.R.S. 13-1001, 1101 and 1105, Ct. III: Attempted Armed Robbery in violation of A.R.S. 13-1001, 1902 and 1904, Ct. IV: Kidnapping in violation of A.R.S. 13-1304 and Ct. V: Kidnapping in violation of A.R.S. 13-1304.

U.S. Department of Justice

Immigration and Naturalization Service

2035 N. Central Avenue
Phoenix AZ 85004

October 15, 1992

Mr. Walter B. LaGrand
c/o Arizona Dept. of Corrections
P.O. Box B
ADOC #42183
Florence, Az. 85232

A 14 865 868

Mr. LaGrand:

This is in response to your inquiry dated June 19, 1992 regarding your immigration status.

A review of the official record in your case reveals that an Order to Show Cause was issued on January 24, 1985, alledging that you are a deportable alien based on your criminal convictions for Burglary, Attempted Aggravated Robbery, Armed Robbery, Kidnapping, Attempted Murder, and Murder. That Order to Show cause was served upon you by certified mail at the Arizona State Prison in Florence, Arizona.

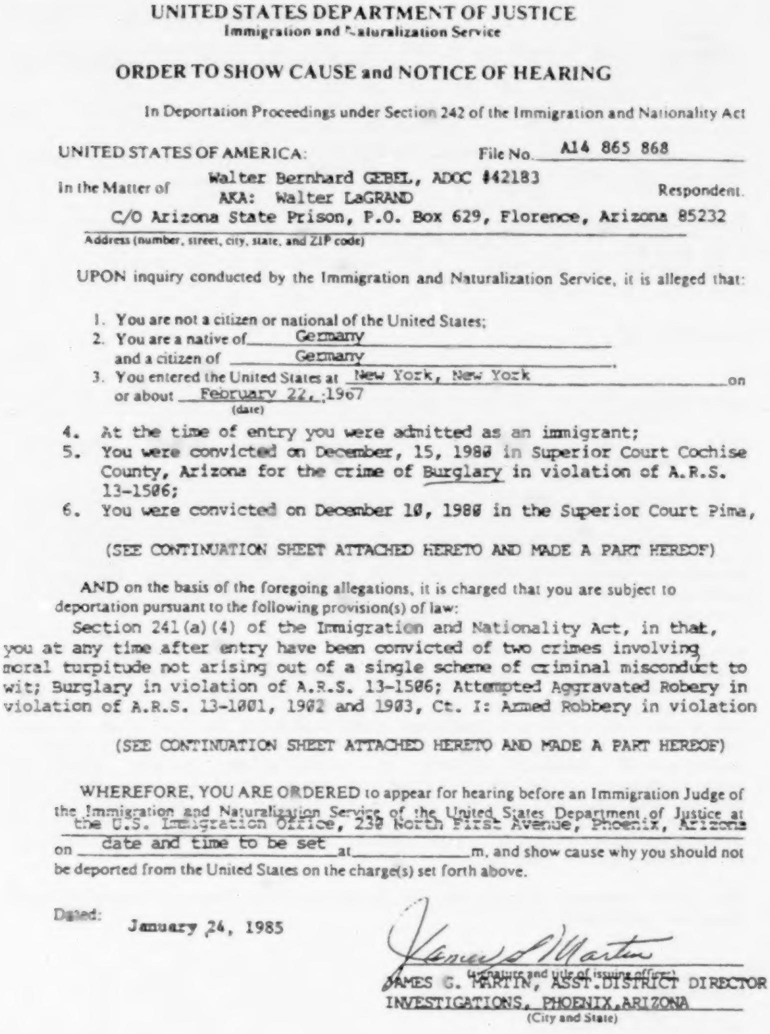
An immigration detainer/notice of action by the Immigration and Naturalization Service has been placed in your case with the Arizona Department of Corrections. It is for notification purposes only, in order that the Immigration Service would be notified in the event that you are released from custody. At the time of your release, custody conditions would be determined. You would have a deportation hearing before an immigration judge, where a determination would be made as to your deportability from the United States, and as to your eligibility for any relief from deportation. You have the right to be represented by counsel or other representation of your choice, at no cost to the Government, at a deportation hearing.

Per your request, a copy of the Order to Show Cause issued in your case is enclosed.

Sincerely:

Patrick E. Kane

Patrick E. Kane
Acting District Director
Phoenix, Arizona



UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

ORDER TO SHOW CAUSE and NOTICE OF HEARING

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA: File No. A14 865 868

In the Matter of Walter Bernhard GEBEL, ADOC #42183
AKA: Walter LaGRAND Respondent.

C/O Arizona State Prison, P.O. Box 629, Florence, Arizona 85232
Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Germany and a citizen of Germany.
3. You entered the United States at New York, New York on or about February 22, 1967 (date)
4. At the time of entry you were admitted as an immigrant;
5. You were convicted on December, 15, 1980 in Superior Court Cochise County, Arizona for the crime of Burglary in violation of A.R.S. 13-1506;
6. You were convicted on December 10, 1980 in the Superior Court Pima,

(SEE CONTINUATION SHEET ATTACHED HERETO AND MADE A PART HEREOF)

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(4) of the Immigration and Nationality Act, in that, you at any time after entry have been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct to wit; Burglary in violation of A.R.S. 13-1506; Attempted Aggravated Robery in violation of A.R.S. 13-1001, 1902 and 1903, Ct. I: Armed Robbery in violation

(SEE CONTINUATION SHEET ATTACHED HERETO AND MADE A PART HEREOF)

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at the U.S. Immigration Office, 230 North First Avenue, Phoenix, Arizona on date and time to be set at ________ m, and show cause why you should not be deported from the United States on the charge(s) set forth above.

Dated: January 24, 1985

James G. Martin
(signature and title of issuing officer)
JAMES G. MARTIN, ASST.DISTRICT DIRECTOR
INVESTIGATIONS, PHOENIX,ARIZONA
(City and State)

NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDING

THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATIO WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS. THE LAW REQUIRES THAT IT BE CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding, at no expense to the Government, by a attorney or other individual authorized and qualified to represent persons before the Immigration and Na uralization Service. You should bring with you any affidavits or other documents which you desire to ha considered in connection with your case. If any document is in a foreign language, you should bring th original and certified translation thereof. If you wish to have the testimony of any witnesses considere you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Ord to Show Cause and that you are deportable on the charges set forth therein. You will have an opportunity t present evidence on your own behalf, to examine any evidence presented by the Government, to object, o proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Gov ernment. Failure to attend the hearing at the time and place designated hereon may result in a determina tion being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation, in cluding the privilege of departing voluntarily, for which you may appear eligible. You will be given a rea sonable opportunity to make any such application to the Immigration Judge.

Failure to attend the hearing at the time and place designated hereon may result in your arrest and deten tion by the Immigration and Naturalization Service.

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

(signature of respondent)

Before:

(signature and title of witnessing officer)

(date)

CERTIFICATE OF SERVICE

This order and notice were served by me on 1-25-85 (date) in the following manner:

Certified mail
W/I-618 & Legal Notice

(signature and title of employee)
Clerk-Typist

Allegations Con't

County, Arizona for the crime of Attempted Aggravated Robbery in violation of A.R.S. 13-1001, 1902 and 1903, committed on or about June 18, 1980;

7. You were convicted on April 27, 1982 in the Superior Court of Pima County, Arizona for the crimes of Ct. I: Armed Robbery in violation of A.R.S. 13-1902 and 1904 and Ct. II: Kidnapping in violation of A.R.S. 13-1304, both committed on October 9, 1981;

8. You were convicted on December 14, 1984 in the Superior Court of Pima County, Arizona for the crimes of Ct. I: Murder in violation of A.R.S. 13-1101 and 1105, Ct. II: Attempted Murder in violation of A.R.S. 13-1001, 1101 and 1105, Ct. III: Attempted Armed Robbery in violation of A.R.S. 13-1001, 1902 and 1904, Ct. IV: Kidnapping in violation of A.R.S. 13-1304 and Ct. V: Kidnapping in violation of A.R.S. 13-1304, all committed on January 7, 1982.

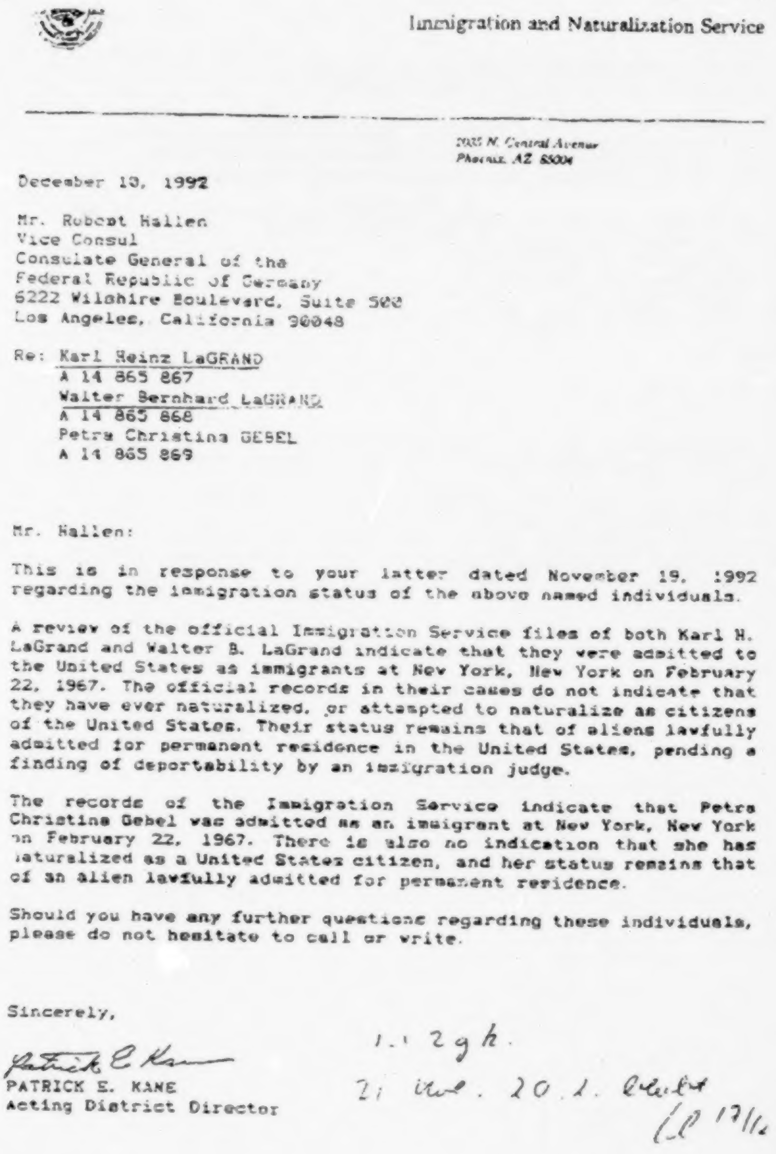
Con't

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

of A.R.S. 13-1902 and 1904, Ct. II: Kidnapping in violation of A.R.S. 13-1304, Ct. I: Murder in violation of A.R.S. 13-1101 and 1105, Ct. II: Attempted Murder in violation of A.R.S. 13-1001, 1101 and 1105, Ct. III: Attempted Armed Robbery in violation of A.R.S. 13-1001, 1902 and 1904, Ct. IV: Kidnapping in violation of A.R.S. 13-1304 and Ct. V: Kidnapping in violation of A.R.S. 13-1304

Annex MG 43

U.S. DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,
LETTER TO THE GERMAN CONSULATE GENERAL
IN LOS ANGELES
(10 DECEMBER 1992)



Immigration and Naturalization Service

2035 N. Central Avenue
Phoenix, AZ 85004

December 10, 1992

Mr. Robert Hallen
Vice Consul
Consulate General of the
Federal Republic of Germany
6222 Wilshire Boulevard, Suite 500
Los Angeles, California 90048

Re: Karl Heinz LaGRAND
A 14 865 867
Walter Bernhard LaGRAND
A 14 865 868
Petra Christina GEBEL
A 14 865 869

Mr. Hallen:

This is in response to your letter dated November 19, 1992 regarding the immigration status of the above named individuals.

A review of the official Immigration Service files of both Karl H. LaGrand and Walter B. LaGrand indicate that they were admitted to the United States as immigrants at New York, New York on February 22, 1967. The official records in their cases do not indicate that they have ever naturalized, or attempted to naturalize as citizens of the United States. Their status remains that of aliens lawfully admitted for permanent residence in the United States, pending a finding of deportability by an immigration judge.

The records of the Immigration Service indicate that Petra Christina Gebel was admitted as an immigrant at New York, New York on February 22, 1967. There is also no indication that she has naturalized as a United States citizen, and her status remains that of an alien lawfully admitted for permanent residence.

Should you have any further questions regarding these individuals, please do not hesitate to call or write.

Sincerely,

Patrick E. Kane
PATRICK E. KANE
Acting District Director

1.) zgk.
2.) Wv. 20.1. [illegible]
[illegible] 17/12

Annex MG 44

INTER-AMERICAN COURT OF HUMAN RIGHTS, REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE GOVERNMENT OF THE UNITED MEXICAN STATES (17 NOVEMBER 1997)

REQUEST FOR AN ADVISORY OPINION
SUBMITTED BY THE GOVERNMENT OF THE UNITED MEXICAN STATES
(COURTESY TRANSLATION, AS REVIEWED BY THE MEXICAN MINISTRY OF FOREIGN AFFAIRS)

I. CONSIDERATIONS THAT GAVE RISE TO THE REQUEST

The Government of Mexico has been making numerous representations on behalf of 38 Mexican nationals sentenced to death in ten states of the United States of America[1]. The receiving State did not inform these persons, either immediately or subsequently, of their right to communicate with the Mexican consular authorities, as it is required to do by Article 36 of the Vienna Convention on Consular Relations[2] . Inasmuch as this provision contains obligations binding on the receiving State and not on the affected individuals, the Government of Mexico considers that if the authorities of the receiving State fail to inform the interested parties of the rights conferred on them by that instrument in a timely fashion, the authorities deprive them of the effective exercise and enjoyment of their rights. Accordingly, the Government of Mexico has energetically protested against this irregularity in the bilateral sphere.

Two Mexican nationals in the situation described above were recently executed, following rejection of their claims of failure to receive the timely notification referred to in Article 36. Although it is a generally accepted principle in inter-American sphere that every federal State constitutes a single entity in international law[3], in the first case the authorities of Texas argued that this constituent unit was not a signatory to the Vienna Convention. In the second case, the federal authorities of the United States of America offered "profound apologies" to the Government of Mexico after the application of the death penalty by the State of Virginia. It bears noting that the State of Texas recently set execution dates the first suspended and the second postponed in two other cases concerning Mexican nationals in which Article 36 of the Vienna Convention was not observed either.

In the view of the Government of Mexico, the injury suffered by detained aliens as a result of failure to notify them of their rights under Article 36 renders void their right to due process. From the moment of their arrest, aliens find themselves at a disadvantage because of language differences, their lack of knowledge of the legal system of the country in which they will be tried, their lack of knowledge of their constitutional and legal rights at the moment of their detention, and the risk of not obtaining adequate legal representation, all of which may affect the outcome of their trials. To put the problem in its proper perspective, attention should be drawn to various guarantees that international human rights law confers on persons accused of crimes for which capital punishment may be imposed, and to the importance of the consular function within the framework of such guarantees in the case of aliens.

A. MINIMUM GUARANTEES IN PROCEEDINGS FOR CRIMES PUNISHABLE BY THE DEATH PENALTY

---

[1] Arkansas, Arizona, California, North Carolina, Florida, Illinois, Ohio, Oregon, Nevada, and Texas.

[2] Vienna, Austria, 24/04/63, U.N.T.S, 8632 (entry into force: 19/03/67). Article VI of the bilateral Consular Convention signed by Mexico and the United States of America, 12/08/42, U.N.T.S. 301, contains similar provisions.

[3] Convention on the Rights and Duties of States, Montevideo, 26/12/33, Art.2.

ie American States recognize that in the specific case of the death penalty, the fundamental hts of a human being must be scrupulously observed and respected, since the application of e death penalty "has irrevocable consequences, forecloses the correction of judicial error, and ecludes any possibility of changing or rehabilitating those convicted[4]".

ie grave consequences of the execution of capital punishment are the irreparable loss of that ost fundamental of human rights that is the right to life, from whose enjoyment springs that of all ner rights. It is therefore essential to ensure that the imposition and application of this nishment strictly observes in all cases the provisions set forth in human rights instruments, ich establish clear restrictions as far as both its imposition and its application are concerned.

e Inter-American Court, in interpreting Article 4 of the American Convention on Human Rights in gard to the right to life, observed that, "[t]he text of the article as a whole reveals a clear dency to restrict the scope of this penalty both as far as its imposition and its application are ncerned" and that "[t]he subject is governed by a substantive principle laid down in the first ragraph, which proclaims that 'every person has the right to have his life respected', and by the ocedural principle that 'no one shall be arbitrarily deprived of his life. ...' Thus, three types of itations can be seen to be applicable to States Parties which have not abolished the death nalty. **First, the imposition or application of this sanction is subject to certain procedural quirements whose compliance must be strictly observed and reviewed**[5]."

ie Inter-American Commission on Human Rights (ICHR) has observed that death sentences ich are judicially imposed **without fulfilling the judicial guarantees** constitute a violation of e right to life[6]. In an individual case, the ICHR concluded that the execution of two persons for mes committed when they were under 18 years of age constituted a violation of the right to life d also, in the circumstances of that case, a violation of the right to equal protection of the law shrined in the American Declaration of the Rights and Duties of Man[7].

ie United Nations General Assembly, by Resolutions 35/172 and 36/22 of December 15, 1980 d November 9, 1981, urged all countries to avoid the practice of arbitrary executions, and to **spect the procedural guarantees set forth in Articles 6, 14 and 15 of the International ovenant on Civil and Political Rights**. In turn, the Special Rapporteur on Summary and bitrary Executions declared that the concept of arbitrary or summary execution includes ecutions "resulting from a sentence passed through a proceeding without guarantees and, in **articular, without the minimum procedural guarantees enshrined in Article 14 of the ternational Covenant on Civil and Political Rights**[8]."

ticle 6 of the International Covenant on Civil and Political Rights stipulates that the death penalty ay be imposed only "in accordance with the law in force at the time of the commission of the ime and not contrary to the provisions of the present Covenant[9]." This precept must be terpreted in accordance with other provisions of the Covenant, which, read as a whole, prohibits uel methods of execution and requires, as a minimum in terms of the execution, that it cause no

---

Protocol to the American Convention on Human Rights concerning the Abolition of the Death Penalty, Asunción, raguay, 8/06/90, Preamble.

Restrictions to the Death Penalty, Advisory Opinion OC-3/83 of September 8, 1983, paragraphs 52, 53 and 55 mphasis added).

See for example, Report on Chile (1974), *Diez Años*, page 251; Report on Cuba (1983), page 97, para. 17.

Roach and Pinkerton versus USA, Decision 3/87, Case 9647.

E/CN.4/1983/16, para. 66 (emphasis added).

For the Human Rights Committee's interpretation of this clause, see Mbenge v. Zaire (No. 16/1977), Report 1983, ges 142-3, para. 17.

physical or spiritual suffering beyond the loss of life[10]. Every law that stipulates the death penalty must meet the minimum guarantees of a fair trial that are established in Articles 14 and 15 of the Covenant[11]. The Human Rights Committee has stipulated that, in capital punishment cases, the duty of the States Parties to observe rigorously all the guarantees for a fair hearing established in Article 14 is particularly imperative. The Committee further observed that, in capital punishment cases, depending on the circumstances, prolongation of the proceedings may constitute, *per se*, a form of cruel, inhuman or degrading treatment[12].

When the persons involved are of foreign nationality, it is evident that the minimum penal guarantees embodied in human rights instruments must be applied and interpreted in compliance with the Vienna Convention. Otherwise, foreign accused persons and defendants would be deprived of a suitable means of making effective those guarantees in their particular circumstances, with irreparable results in capital punishment cases.

B. THE CONSULAR FUNCTION AND THE APPLICATION OF THE DEATH PENALTY TO ALIENS

The following are some of the measures that the Mexican consular authorities can adopt on behalf of Mexican nationals accused of crimes punishable by death or those already sentenced to death, gathered from experience acquired in cases that have taken place in the United States of America. As it will be observed, timely consular assistance can be a determinig factor in the outcome of the corresponding trials.

- The consular assistance granted from the moment of the arrest guarantees, *inter alia*, that a detained alien is made aware, **in his own language and in an accessible manner**, of his constitutional and legal rights in the country in which he is apprehended; that he is provided without delay with adequate legal assistance; that he is made aware of the possible legal consequences (application of the death penalty) of the crime of which he stands accused; that the manner in which the legal system functions in the country in which he is detained is explained to him; and, particularly, **that he is informed of his right not to incriminate himself and not to make any statement or confession before he has been provided with adequate legal counsel.**

- In the initial stages of the corresponding proceedings, the accused enjoys the right to be represented by legal counsel free of charge. However, this right is not necessarily maintained throughout the proceedings, particularly once the first appeals have been exhausted. In the experience of the Government of Mexico, there have been numerous cases in which the defendant was represented by public defenders whose workload, irrespective of their professional skills, was greater than the resources at their disposal for giving due attention to the case. Consular agents may take measures to ensure that the defendant or convicted person receives adequate legal defense throughout the proceedings; for instance, *via* bar associations or private law firms that possess the human and material resources to ensure thorough performance of the task. It has been observed that state laws in the United States of America are not uniform in regard to court-appointed legal defense.

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[10] M. Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, p. 117. See Article 7 of the Covenant.

[11] In the cases of capital punishment against Zaire, Jamaica, and Trinidad and Tobago, the Committee insisted on strict compliance with the minimum guarantees. In the case of Mbenge v. Zaire, the Committee concluded that the imposition of the death penalty without the fulfillment of the minimum guarantees enshrined in Article 14(3) also constitutes a violation of Article 6(2). In Robinson v. Jamaica, the Committee established its repeated case law that "the need for legal assistance in cases of capital punishment is axiomatic." In default of legal counsel and in other cases of inequality that constituted an unfair trial, the Committee found that Article 14, paragraphs 1 and 3, had been violated and that those violations should be remedied by the victim's release. In Pinto v. Trinidad and Tobago, as in other cases, the Committee reiterated that stance, adding that legal assistance to the defendant in a capital punishment case should be granted in such a manner as to ensure justice adequately and effectively. See Nowak, *supra*, pp. 118-20.

[12] Reid v. Jamaica, No. 250/1987 (20 July 1990), paras. 11.6 and 12.2.

It bears noting that the adequate defense of a case involving crimes that carry the death penalty, or those for which the death penalty has already been imposed, often has an exhorbitant cost and is unusually time-consuming as compared to other kinds of cases. There is also the need for professional interpreters when aliens are involved. Nationals of the receiving State do not find themselves at this disadvantage, which may be attenuated in the case of aliens by the timely intervention of consular agents.

* Consular agents can assist the defense in obtaining evidence, including evidence that attests to "mitigating[13]" circumstances. These circumstances may persuade the jury to refrain from imposing the death penalty. Unlike persons who have been found guilty of crimes punishable by the death penalty and who are nationals of the State in which the case is tried, in the case of persons found guilty of such crimes who are not nationals of that State, the bulk of mitigating evidence is normally to be found abroad: school records, character witnesses, criminal and employment records, and so on. It must be said that, once capital punishment has been imposed, it is extremely difficult for a sentence to be reversed, and that early intervention by the consular authorities is the most accessible means of procuring that mitigating evidence, which usually requires extensive interviews and investigations in the defendants' place of origin.

In particular, consular assistance can facilitate: the hiring and payment of investigators by the Government of Mexico, should it be necessary, to help the defense attorneys accurately establish facts on which the outcome of the proceeding depends; the travel of lawyers or experts to Mexico to study or acquaint themselves with the environment in which the defendant was raised in order to gather evidence; the transport of relatives or defense witnesses from the State of origin to the receiving State; securing the opinion of the consulting attorneys of the consular authorities; ensuring that links of communication are established between the defendant or convicted person and his defense attorney, and, should the defense be inadequate, procuring adequate legal representation for the accused or convicted person; and even ensuring that the defendant has access to adequate interpretation. Without consular assistance from the State of their nationality, accused or convicted foreigners may remain virtually defenseless, which is not the case with nationals of the receiving State.

* Consular agents may act as assistants to the defense attorneys in the courts, or as *amicus curiae*, or may request their government to appoint an *ad hoc* official as *amicus curiae*, mindful of the nature of the trial, providing the courts with information on, *inter alia*, the relevant international norms when the laws and competent courts so permit. Consular agents may also help the defense in producing testimony from experts on the scope of the provisions of the Vienna Convention in order to ensure that the prosecutors, juries and competent courts are aware of the text and meaning of the provisions. The intervention of such experts is not necessary in the case of nationals of the receiving State. However, its absence in cases concerning aliens results in an imbalance that is difficult to remedy without the intervention of consular agents.

* Consular agents can keep other interested authorities and bodies of the State of origin -departments of the Executive Branch of the federal government, state governors, public human rights commissions, legislators, etc.- informed on the development of the case. These, in turn, can undertake whatever measures they deem appropriate within their respective spheres of competence, such as supporting the gathering of evidence referred to above.

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[13] On the subject of mitigating circumstances, see, for example, Soering v. United Kingdom, European Court of Human Rights, 11 E.H.R.R. 439 (1989), paras. 45-47.

"Consular agents may also visit the accused or convicted person with prior notification to the local authorities. The consular agents can also facilitate visits to the defendant or convicted person by his relatives and even by his lawyers. Mention should be made of the practice of some high-security penitentiaries that deny lawyers access to their clients during media interviews. In this way, consular visits not only render conditions more humane for the inmate and his relatives but also make the interested parties aware of the possible juridical consequences of their statements and act as a bridge for communication between defense attorneys and their clients when the former are not present. In addition, cultural and linguistic factors highlight the importance of consular visits to alien defendants and convicted persons who would otherwise find themselves at an obvious disadvantage *vis-à-vis* the nationals of the receiving State.

To illustrate the above, the Government of Mexico can cite specific cases, all of which were tried in the State of Texas, in which consular assistance was decisive in the outcome of the proceedings, despite the fact that the Mexican Government was unable to provide it from the moment of the detention because of non-compliance with Article 36 of the Vienna Convention. In the first case, tried in Jefferson County (case of Omar Ayala, abducted in Palau, Coahuila), imposition of the death penalty was avoided. In the second case, tried in Fort Bend County (case of Francisco Cárdenas, a native of Celaya, Guanajuato), consular intervention helped in lifting the death sentence. In the third case, tried in Harris County (case of Ricardo Aldape, a native of Monterrey, Nuevo León), consular assistance helped in releasing the death row inmate, after fifteen years, for lack of evidence. As these cases show, far from constituting a harmless error, where capital punishment is concerned, the receiving State's failure to fulfill its obligations under Article 36 of the Vienna Convention gravely damages an alien defendant or convicted person since consular assistance has actually been a determining factor in avoiding the imposition or application of the death penalty.

In short, foreigners who confront an alien juridical system which operates, in the cases that have given rise to this request, in a language in which the interested parties are not usually fluent cannot actually enjoy the same guarantees as nationals of the receiving State without the communication with and assistance of the consular authorities of the State of which the foreigners are nationals. Consular intervention is precisely what attenuates the situation of disadvantage in which such foreigners find themselves, and this is all the more evident in crimes subject to the death penalty and in cases in which capital punishment has already been imposed.

In light of the foregoing, the Government of Mexico considers that the lack of notification, which is the reason for this request, places those concerned in a situation of inequality before the courts and even before the law, and deprives them of facilities that are legitimate and adequate in their circumstances for the preparation of their defense, and of the right to due process and to the minimum guarantees required in a regular proceeding in accordance with international law. In the view of the Government of Mexico, not only does this omission violate the Vienna Convention, but it is also incompatible with various human rights instruments whose object and purpose, as established by the Inter-American Court itself, "is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States[14]."

The Government of Mexico considers that the authorized opinion of the Inter-American Court in this matter would not only be helpful in the measures undertaken by the Government itself and by the respective defense attorneys on behalf of Mexican nationals, but it would also benefit nationals of other countries who may find themselves in a similar situation in the inter-American sphere in general, inasmuch as "the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality[15]." According to information released by a group of defense lawyers, nationals of third countries may have been sentenced to death in Arizona, California, Florida, Ohio, Texas and Virginia, and for federal crimes in the United States of America, without the timely notification required by the Vienna Convention. According to the same source, five other member States of the OAS (Argentina, Canada, Honduras, Paraguay and Peru) may have nationals in the same situation in the United States of America.

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[14] *Restrictions to the Death Penalty, supra*, para. 50.

II. APPLICABLE PROVISIONS

Article 36 of the Vienna Convention "Communication and contact with nationals of the sending State" stipulates:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State.
>
> b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
>
> c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.[16]
>
> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

The present request refers to situations in which both the sending State and the receiving State are Parties to the Vienna Convention, in which both are members of the OAS and signed the American Declaration of the Rights and Duties of Man, whose juridical significance has been recognized by that Court, and in which although the receiving country has not ratified the American Convention, it has ratified the United Nations International Covenant on Civil and Political Rights. The present request is limited to cases involving capital punishment because of the irreparable consequences of its application; however, no part of the present request shall be interpreted to the detriment of complying with the Vienna Convention in any other circumstances whatsoever.

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[15] American Convention on Human Rights, Preamble.

[16] Article 16 (7) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,to which Mexico is a signatory, contains similar provisions. Article 10 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live, adopted by the UN General Assembly through resolution 40/114 of December 13, 1985, recognizes as a human right of all aliens the freedom to communicate with the consulate or diplomatic mission of the State of which they are nationals. Also, paragraph 38.1 of the Standard Minimun Rules for the Treatment of Prisoners, adopted on August 30, 1955, establishes that: "Prisoners, who are foreign nationals, shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong".

On these premises, the authorized opinion of the illustrious Inter-American Court of Human Rights is sought on the following questions, on the basis of Article 64(1) of the American Convention and Articles 59 and 60 of the Rules of Procedure of the Court:

A. VIENNA CONVENTION ON CONSULAR RELATIONS

A reading of Article 36 of the Vienna Convention shows that this provision makes a distinction between the rights of the sending State with regard to its nationals, the obligations of the receiving State with regard to the sending State and the nationals of the sending State, and the rights of the interested person in regard to the receiving State.

In light of the above, the following specific questions about the Vienna Convention are raised:

Within the framework of Article 64(1) of the American Convention, should Article 36 of the Vienna Convention be interpreted as containing provisions concerning the protection of human rights in the American States?

From the standpoint of international law, is the enforceability of the individual rights conferred on foreigners by the above-mentioned Article 36, by the interested parties before the receiving State, subject to the protests of the State of which the interested parties are nationals?

Taking into account the object and purpose of Article 36(1)(b) of the Vienna Convention, should the expression "without delay" contained in that provision be interpreted as requiring the authorities of the receiving State to inform every foreigner detained for crimes punishable by the death penalty of the rights conferred on him by the same Article 36(1)(b), at the time of the arrest, and in any case before the detained foreigner makes any statement or confession before the police or judicial authorities?

From the standpoint of international law and in the case of aliens, what should be the juridical consequences of the imposition and execution of the death penalty when there has been a failure to make the notification referred to in Article 36 (1)(b) of the Vienna Convention?

B. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Article 2, paragraphs 1 and 2, of the Covenant on Civil and Political Rights establishes the following duties of the States Parties:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Article 6, paragraphs 1 and 2, of the Covenant establishes:

> 1. Every human being has the inherent right to life. This right shall be protected by law. *No one shall be arbitrarily deprived of his life.*

> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission and *not contrary to the provisions of the present Covenant....*

Article 14 of the Covenant establishes, *inter alia*:

> 1. *All persons shall be equal before the courts and tribunals.* In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
>
> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, *in full equality*:
>
> b) To have *adequate time and facilities for the preparation of his defence* and to communicate with counsel of his own choosing

The United Nations' safeguards to ensure the protection of the rights of persons sentenced to the death penalty, adopted by the Economic and Social Council on May 25, 1984, establish in paragraph 5:

> Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings[17].

Article 50 of the Covenant stipulates that: "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions."

The following specific questions are raised with regard to the Covenant:

Within the framework of Article 64(1) of the American Convention, should Articles 2, 6, 14 and 50 of the Covenant be interpreted as containing provisions concerning the protection of human rights in the American States?

Within the framework of Article 14 of the Covenant, should it be understood that Article 14 should be applied and interpreted in light of the expression "all possible safeguards to ensure a fair trial" contained in paragraph 5 of the respective United Nations safeguards, and that in the case of foreigners accused of or charged with crimes punishable by the death penalty the same expression includes immediate notification to the detainee or defendant, by the receiving State, of the rights conferred on him by Article 36(1)(b) of the Vienna Convention?

In the case of foreign persons accused of or charged with crimes punishable by the death penalty, is the receiving State's failure to make the notification referred to in Article 36(1)(b) of the Vienna Convention compatible with their right to "adequate... facilities for the preparation of his defence", pursuant to Article 14 (3)(b) of the Covenant?

In the case of foreign persons accused of or charged with crimes punishable by the death penalty, should the term "minimum guarantees" contained in Article 14(3) of the Covenant, and the term "at least equal" contained in paragraph 5 of the corresponding United Nations safeguards be interpreted as exempting the receiving State from immediate

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[17] ECOSOC, Resolution 1984/50; General Assembly, Resolution 39/118 (emphasis added).

compliance with the provisions of Article 36(1)(b) of the Vienna Convention with respect to the detained person or defendant?

In the case of American countries constituted as federal States which are Parties to the Covenant on Civil Rights, and within the framework of Articles 2, 6, 14 and 50 of the Covenant, are those States bound to ensure the timely notification referred to in Article 36 (1)(b) of the Vienna Convention to every individual of foreign nationality who is arrested, detained or tried in its territory for crimes punishable by the death penalty; and to adopt provisions in keeping with their domestic laws to give effect in such cases to the timely notification referred to in this article in all its component parts, if the same provision is not already guaranteed by legislative or other provisions, in order to give full effect to the corresponding rights and guarantees enshrined in the Covenant?

Within the framework of the Covenant and in the case of persons of foreign nationality, what should be the juridical consequences of the imposition and execution of the death penalty when there has been a failure to make the notification referred to in Article 36(1)(b) f the Vienna Convention?

C. CHARTER OF THE OAS AND THE AMERICAN DECLARATION

Article 3(k) of the OAS Charter reaffirms as a principle of the Organization that: "The American States proclaim the fundamental rights of the human person without distinction as to race, nationality, creed or sex.

According to the Inter-American Court, the American Declaration on the Rights and Duties of Man "contains and defines those essential human rights to which the Charter refers, so that the Charter of the Organization with regard to human rights may not be applied or interpreted without incorporating its pertinent norms into the corresponding norms contained in the Declaration[18]."

In the view of the Government of Mexico, the pertinent articles in this case are Articles I (Right to life, liberty and personal security), II (Right to equality before the law), and XXVI (Right to due process of law) of the Declaration:

> Article I. Every human being has the right to life, liberty and the security of his person.
>
> Article II. All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.
>
> Article XXVI. Every accused person is presumed to be innocent until proven guilty.
>
> Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

The following specific questions are asked with regard to the interpretation of the Charter and the Declaration:

In cases of arrest and detention of aliens for crimes punishable by the death penalty and in the framework of Articles 3(k) of the Charter and II of the Declaration, is the failure to notify the detainee or defendant immediately of the rights conferred on him under Article 36 (1)(b) of the Vienna Convention compatible with the Charter's proclamation of human

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[18] *Interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, of July 14, 1989, para. 43.

rights, without distinction of nationality, and with the Declaration's recognition of the right to equality before the law without distinction as to any factor?

In the case of aliens and in the framework of Article 3(k) the OAS Charter and Articles I, II and XXVI of the Declaration, what should be the juridical consequences of the imposition and execution of the death penalty, when there has been a failure to make the notification referred to in Article 36(1)(b) of the Vienna Convention?

III. ADMISSIBILITY

Mexico is a member State of the OAS and a Party to the American Convention. The present request identifies the treaties and the provisions of them whose interpretation is sought, as well as the specific questions on which it (Mexico) intends to obtain the opinion of the Court, and the considerations that gave rise to the request[19], with the understanding that more details may be furnished and additional factors clarified during the corresponding hearing.

Article 64(1) of the Convention authorizes the Court to render advisory opinions on the interpretation of the Declaration, within its sphere of jurisdiction in connection with the Charter and the Convention[20], and of other treaties concerning the protection of human rights in the American States[21].

The Government of Mexico does not intend for the Court to determine the scope of international commitments undertaken by States that are not members of the OAS, nor does it intend for the Court to interpret norms for the functioning of organs and organizations outside the Inter-American system[22]. On the contrary, the present request directly concerns the protection of human rights in the Americas and its main purpose is to ensure compliance with, and to determine the scope of, the obligations acquired by member States of the OAS in accordance with international law[23].

Furthermore, the Court is not being asked to interpret any State's domestic law, nor to exercise its advisory jurisdiction "for purely academic speculation, without a foreseeable application to concrete situations justifying the need for an advisory opinion[24]." As shown in the introduction to the request, the present situation is one in which non-fulfillment of international commitments may have irreparable consequences on that most fundamental of all rights of the human person: the right to life. It is also worth recalling cases of commutation of the death penalty as a result of domestic courts' applying and interpreting human rights instruments in the same manner as international protection organs[25]. Moreover, there have been cases in which the advisory proceedings before the Court have contributed in harmonizing domestic laws concerning the death penalty with the requirements of international human rights treaties, and even in suspending executions[26]. Nevertheless, the intention of the request is not for the Court to rule on the State's responsibility in any specific case.

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[19] Rules of Procedure of the Inter-American Court, Arts. 59 and 60(1).

[20] *Interpretation of the American Declaration*, *supra*, para. 48

[21] *"Other Treaties" Subject to the Advisory Jurisdiction on the Court*, Advisory Opinion OC-1/82 of September 24, 1981, Ser. A. No. 1, para. 52 ("First").

[22] Ibid. ("Second").

[23] Ibid., para. 38.

[24] *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87 of October 6, 1987, Ser. A, No. 9, para. 16.

[25] See, for example, Pratt and Morgan v. Attorney -General of Jamaica, 1993 Appeal No. 10 (J.P.C.), 14 H.R.L.J. 338 (1993).

[26] See *Restrictions to the Death Penalty*, Advisory Opinion OC-3/83 of September 8, 1983, Pleadings Oral Arguments and

Documents, Ser. B, No. 3, at. 222 (statement of Guatemala).

It must be emphasized, therefore, that the request does not seek to impair the system of protection to the detriment of any individual, but to obtain an opinion through an advisory proceeding "designed to assist the States and organs in fulfilling and applying human rights treaties, without subjecting them to the formalities and to the system of sanctions that characterizes the contentious proceeding[27]." The Government of Mexico considers that the authorized opinion of the Court would be extremely important for the injured individuals, their defenders, the authorities of the sending and receiving States, as well as for the international protection organs and especially for the preservation of a fundamental human right. The factors set forth herein fully justify the Court's rendering the requested opinion.

IV. PETITIONS

The Government of Mexico requests the illustrious Inter-American Court:

FIRST.- To transmit a copy of this request to the States and organs referred to in Article 62(1) of the Rules of Procedure of the Court. To invite all the interested persons and entities to submit written opinions on the points that are the subject of the request, pursuant to Article 62(3) of its Rules of Procedure.

SECOND.- To convene the hearing provided for in Article 62(4) of the Rules of Procedure.

THIRD.- To declare the request admissible and render the advisory opinion in due course.

V. NAME AND ADDRESS OF THE AGENT OF THE GOVERNMENT OF MEXICO

The Government of Mexico appoints Ambassador Sergio Gonzalez-Gálvez, Assistant Secretary for Multilateral Affairs, as its Agent, and *Licenciado* Enrique Loaeza-Tovar, General Coordinator for Protection and Consular Affairs; and *Licenciado* Miguel Ángel González-Félix, Legal Adviser, who are attached to the Ministry of Foreign Affairs, as its Alternate Agents; and *Licenciados* Maria Isabel Garza, Jorge Cicero, and Hernán Ruiz, officials in the same Ministry, are appointed as advisers. The Government of Mexico will receive notifications at: Consultoría Jurídica, Secretaría de Relaciones Exteriores, Nonoalco 1, Edif. Nuevo, Cuerpo "B", 3er nivel, Tlatelolco, Mexico, D.F., C.P. 06995.

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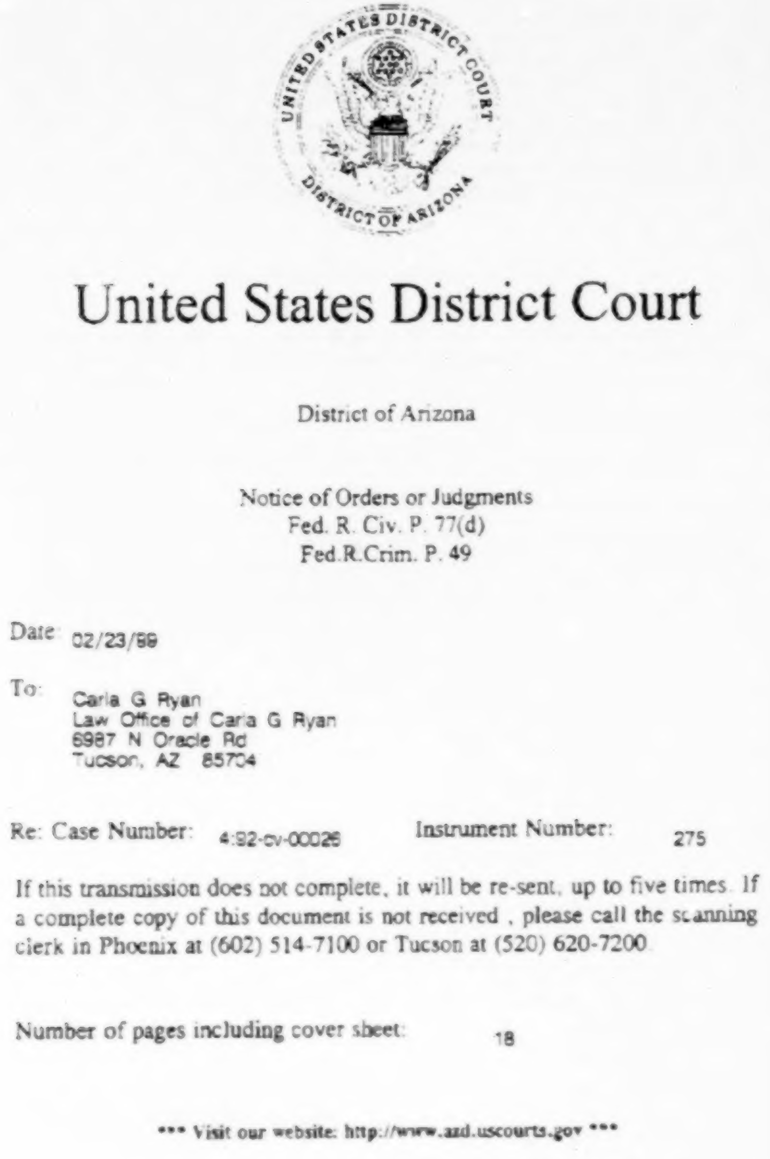
[27] *Restrictions to the Penalty*, supra, para. 43.

Annex MG 45

UNITED STATES DISTRICT COURT
OF THE DISTRICT OF ARIZONA,
KARL LAGRAND V. STEWART
(ORDER OF 23 FEBRUARY 1999)



United States District Court

District of Arizona

Notice of Orders or Judgments
Fed. R. Civ. P. 77(d)
Fed.R.Crim. P. 49

Date: 02/23/99

To: Carla G Ryan
Law Office of Carla G Ryan
6987 N Oracle Rd
Tucson, AZ 85704

Re: Case Number: 4:92-cv-00026 Instrument Number: 275

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DISTRICT OF ARIZONA
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

CV 92-26 Tuc JMR

KARL HINZE LaGRAND,
Petitioner,
vs.
TERRY STEWART, et al.,
Respondents.

No. CIV 99-95-TUC-JMR

ORDER

Petitioner Karl Hinze LaGrand is an Arizona prisoner under sentence of death who is scheduled to be executed at 3:00 p.m. on February 24, 1999. Petitioner has filed with the Court what he styled an Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 and a motion for stay of execution. The Petition alleges, among other claims, that execution by lethal gas is cruel and unusual punishment. For the reasons stated herein, the Court finds that it has jurisdiction to entertain Petitioner's lethal gas claim, that the lethal gas claim is procedurally barred from review on the merits, and that the Court lacks jurisdiction to consider the remaining claims.

BACKGROUND

On December 14, 1984, Petitioner and his brother, Walter LaGrand, were sentenced to death for a murder committed in the course of a failed bank robbery. On direct appeal, the Arizona Supreme Court affirmed. *See State v. LaGrand (Karl)*, 152 Ariz. 483, 733 P.2d 1066 (1987); *State v. LaGrand (Walter)*, 153 Ariz. 21, 734 P.2d 563 (1987). Thereafter, the trial court denied relief on Petitioner's first post-conviction petition under Rule 32 of the Arizona Rules of Criminal Procedure, and the Arizona Supreme Court denied review.

Petitioner then sought relief in federal court. In March 1993, Petitioner filed an Amended Petition for Writ of Habeas Corpus which asserted, among other claims, that execution by lethal gas violated the Eighth Amendment. *See LaGrand v. Lewis*, No. CV-92-26-TUC-JMR, Memorandum of Law in Support of Petitioner's Writ of Habeas Corpus at 119 (file doc. 70). The Court found the lethal gas claim procedurally defaulted because Petitioner had failed to raise the claim in state court and no longer had an available state remedy. Following briefing on cause and prejudice, the Court barred the claim from consideration on the merits. *See LaGrand v. Lewis*, No. CV-92-26-TUC-JMR (Order filed Jan. 25, 1995). The Court ultimately denied habeas relief. *See LaGrand v. Lewis*, 883 F.Supp. 469 (D.Ariz. 1995), and *LaGrand v. Lewis*, 883 F.Supp. 451 (D.Ariz. 1995).

On appeal, the Ninth Circuit concluded that Petitioner's lethal gas challenge was not ripe for adjudication because he would be executed by lethal gas only if he affirmatively chose that option. *See LaGrand v. Stewart*, 133 F.3d 1253, 1264 (9th Cir.), *cert. denied*, 119 S. Ct. 422 (1998). The court affirmed in all other respects. *See id.* Following denial of certiorari by the United States Supreme Court, the Arizona Supreme Court issued a warrant of execution, setting the date for February 24, 1999.

On February 4, 1999, Petitioner selected lethal gas as his method of execution. *See* Respondents' Anticipatory Pleading in Opposition to Successive Petition for Writ of Habeas Corpus, at Attachment. Thereafter, Petitioner filed his second state Rule 32 petition, raising numerous grounds for relief, including a challenge to lethal gas. The Superior Court of Pima County dismissed the petition, and on February 23, 1999, the Arizona Supreme Court denied review. Petitioner then filed the present petition and application for stay in this Court.

DISCUSSION

I. Applicability of the AEDPA

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which placed new limitations on claims sought to be raised in a second or successive petition. Title 28, section 2244(b) of the United States Code, as amended by the AEDPA, provides:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence

> that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

Pursuant to the Supreme Court's decision in *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), the amendments to § 2244(b) apply to habeas petitions filed after the AEDPA's enactment.

Petitioner does not specifically address applicability of the AEDPA. Instead, he simply attempts to amend the original habeas proceeding (Civil No. 92-26-TUC-JMR). This he may not do. The Court entered final judgment denying relief on Petitioner's first habeas petition on March 30, 1995. The Ninth Circuit Court of Appeals subsequently affirmed. *LaGrand v. Stewart*, 133 F.3d 1253, 1264 (9th Cir.), *cert. denied*, 119 S. Ct. 422 (1998). Accordingly, Petitioner's present "Amended Petition" must be construed as a second habeas petition. *See, e.g.*, *Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) (en banc) (holding that a Rule 60(b) motion must be treated as a successive petition governed by the AEDPA).

Having determined that Petitioner's amended petition must be treated as a second petition, the Court next addresses whether any of Petitioner's claims fall outside the AEDPA's gatekeeping provisions for second or successive petitions. *See, e.g.*, *Stewart v. Martinez-Villareal*, 118 S. Ct. 1618 (1998) (recognizing exception to AEDPA for second petition raising competency to be executed claim). If not, then this Court lacks jurisdiction and Petitioner must first seek authorization from the Ninth Circuit

Court of Appeals before the Court may consider the claims in a successive petition. See 28 U.S.C. § 2244(b)(3)(A).

A. Lethal Gas as Method of Execution

In Stewart v. Martinez-Villareal, 118 S. Ct. 1618 (1998), the Supreme Court recognized an exception to the AEDPA's gatekeeping requirement for a claim that could not have been adjudicated in the petitioner's first habeas corpus petition. In that case, the petitioner sought federal review of a second habeas application which raised a competency to be executed claim under Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595 (1986). The claim had been raised in the petitioner's initial petition but was dismissed without prejudice as premature. See Martinez-Villareal v. Stewart, 118 F.3d 628, 630 (9th Cir. 1997), affirmed, 118 S. Ct. 1618 (1998) ("[T]he determination of whether an inmate is competent to be executed cannot be made before the execution is imminent, i.e., before the warrant of execution is issued by the state.") (citing Herrera v. Collins, 506 U.S. 390, 406, 113 S. Ct. 853, 863 (1993)). In upholding the Ninth Circuit's conclusion that Martinez-Villareal's Ford claim fell outside the gatekeeping provisions of § 2244(b), the Supreme Court stated, "There was only one application for habeas relief, and the District Court ruled (or should have ruled) on each claim at the time it became ripe." Martinez-Villareal, 113 S. Ct. at 1621.

As in Martinez-Villareal, Petitioner here raised his lethal gas claim in his first petition, but it was found premature. See LaGrand, 133 F.3d at 1264 ("[Petitioners] would be executed by lethal gas only if they affirmatively choose to do so."); see also Poland v. Stewart, 117 F.3d 1094, 1104 (9th Cir. 1997). Since that time, Petitioner has affirmatively chosen gas as his method of execution and an execution warrant is impending. The Court therefore finds that Petitioner's challenge to lethal gas is presently ripe and fits within the exception framework established in *Martinez-Villareal*. Accordingly, Petitioner need not obtain permission from the Ninth Circuit to file a second habeas petition challenging lethal gas as a method of execution. This Court has jurisdiction to entertain the lethal gas claim in a new § 2254 action.

B. Length of Time on Death Row

This claim, which is based on Justice Stevens's memorandum respecting the denial of certiorari in *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421 (1995), was not presented in Petitioner's first habeas petition. In *Ceja v. Stewart*, 134 F.3d 1368, 1369 (9th Cir. 1998), the court determined that an Eighth Amendment challenge based on length of death row confinement which was not raised in a first habeas petition is not excepted from the AEDPA. *See also* *Gretzler v. Stewart*, 146 F.3d 675 (9th Cir. 1998). More recently, in *Gerlaugh v. Stewart*, ___ F.3d ___, 1999 WL 65008 (9th Cir. Feb. 2, 1999), *cert. denied*, 1997 WL 45887 (U.S. Feb. 3, 1999), the Ninth Circuit held that a *Lackey* claim satisfies neither gatekeeping provision of § 2244(b)(2). The Court is therefore without jurisdiction to entertain Petitioner's *Lackey* claim.

C. Vienna Convention

Petitioner raised this claim in his first habeas petition, and

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Because Petitioner attempted to file this petition as an amendment to the original habeas proceeding (CV 92-26-TUC-JMR), the Court orders that the amendment be treated as a new action.

the Court found it procedurally defaulted. The Ninth Circuit affirmed. LaGrand, 133 F.3d at 1261-62. Petitioner is now precluded under 28 U.S.C. § 2244(b)(1) from re-raising the claim in a successive petition. Furthermore, the claim does not satisfy either of the gatekeeping provisions of § 2244(b)(2). See Villafuerte v. Stewart, 142 F.3d 1124 (9th Cir. 1998) (Vienna Convention claim failed to satisfy § 2244(b)(2) exceptions). The Court lacks jurisdiction over this claim.

D. Pecuniary Gain Aggravating Factor
E. Heinous, Cruel or Depraved Aggravating Factor

Both of these claims were presented and denied in Petitioner's first habeas petition. See 28 U.S.C. § 2244(b)(1). To the extent Petitioner asserts there is new law or facts to support his position, the Court finds that the claims do not satisfy § 2244(b)(2)'s gatekeeping provision. Therefore, the Court lacks jurisdiction to consider the merits of these claims absent authorization from the Ninth Circuit. See 28 U.S.C. § 2244(b)(3).

F. Prior Conviction Aggravating Factor

This claim was not raised in Petitioner's first habeas petition. However, Petitioner does not assert that the claim relies on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A). Nor does the claim satisfy the second gatekeeping provision because it is not related to guilt or innocence. See 28 U.S.C. § 2244(b)(2)(B)(ii). Accordingly, absent authorization from the Ninth Circuit, the Court lacks jurisdiction to decide this claim.

G. Juror Bias

Petitioner's claim that a juror was improperly excused for bias was raised and rejected in Petitioner's first habeas petition. Accordingly, the Court does not have jurisdiction to consider this claim. __See__ 28 U.S.C. § 2244(b)(1).

H. Newly Discovered Evidence of Actual Innocence

In this claim, Petitioner asserts that both his conviction and sentence are undermined by newly discovered evidence: two of the investigating detectives assigned to interrogate Petitioner recently stated their belief that Petitioner did not intend to kill and that he had acted under a "panic reaction." For the sentencing aspect of this claim, the Court lacks jurisdiction because it is unrelated to guilt or innocence. __See__ 28 U.S.C. § 2244(b)(2)(B). With respect to the conviction, even assuming the alleged facts could not have been discovered previously through the exercise of due diligence, Petitioner has failed to allege any constitutional error as required by the actual innocence gateway of § 2244(b)(2)(B). __See__ __Villafuerte__, 142 F.3d at 1126-27 (denying permission to file successive petition where petitioner did not show constitutional error from failure to present "newly discovered" evidence).

I. Clemency Proceedings

Pursuant to the Ninth Circuit's decision in __Woratzeck v. Arizona Board of Executive Clemency__, 117 F.3d 400, 402-03 (9th Cir. 1997), an action under 42 U.S.C. § 1983 is the proper vehicle for litigating this claim. Because Petitioner raised the claim in a § 2254 habeas petition, the Court may not grant relief on the basis of this claim.

J. Lethal Injection

This claim was raised in Petitioner's first habeas petition and therefore must be dismissed. See 28 U.S.C. § 2244(b)(1).

K. Competency to be Executed

In Martinez-Villareal v. Stewart, the Ninth Circuit held that, to preserve a competency claim for review outside of the AEDPA's successive petition restrictions, the claim must be raised in a first petition and dismissed as premature. 118 F.3d at 634. Petitioner here did not raise this claim in his first habeas petition. Even assuming this claim falls outside applicability of the AEDPA, Petitioner has utterly failed to assert a legal or factual basis for the claim, stating only that it is included in the petition "to preserve it for later consideration." In addition, Petitioner has yet to present this claim in state court. See A.R.S. § 13-4022.

II. Eighth Amendment Challenge to Lethal Gas

Before a federal court may review a petitioner's claims on the merits, the petitioner must have presented in state court every claim raised in the federal habeas petition. This is referred to as the "exhaustion requirement." Coleman v. Thompson, 501 U.S. 722, 731, 111 S. Ct. 2546, 2554-55 (1991); Rose v. Lundy, 455 U.S. 509, 102 S. Ct. 1198 (1982). To properly exhaust state remedies, the petitioner must "fairly present" his claims to the state's highest court in a procedurally appropriate manner. See Castille v. Peoples, 489 U.S. 346, 351, 109 S. Ct. 1056, 1060 (1989). On comity and federalism grounds, federal courts will not review a petitioner's claim which was denied relief by the state courts based on a state law ground independent of federal law and adequate to support the judgment. See Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497 (1977). When a petitioner is procedurally barred by state procedure from raising a federal claim in state court, a federal court may not consider the merits of the claim unless the petitioner demonstrates legitimate cause for the default and actual prejudice, or shows that a fundamental miscarriage of justice would result. Coleman, 501 U.S. at 750, 111 S. Ct. at 2565.

In his most recent state post-conviction petition, Petitioner included a challenge to the constitutionality of lethal gas as a method of execution.[2] The state superior court ruled that the claim was moot because Petitioner had a choice of lethal injection. The court further found in the alternative that the claim was precluded under A.R.S. § 13-4232(A)(3), which provides: "A defendant is precluded from relief under this article based on any ground . . . [t]hat was waived at trial, on appeal or in any previous collateral proceeding."

In his petition, Petitioner fails to address Respondents' contention, raised in their anticipatory pleadings, that Petitioner's lethal gas claim is procedurally barred from review on the merits in federal court. Nor does Petitioner advance any arguments with regard to cause and prejudice for the alleged default. Nonetheless, because the Court determines that Petitioner's lethal gas claim is procedurally defaulted, the Court will set forth in some detail the basis for its conclusion.

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[2] Petitioner did not raise his lethal gas challenge at sentencing, on direct appeal, or in his first petition for state post-conviction relief. The claim was presented for the first time in his 1993 federal habeas petition. At that time, the Court determined that Petitioner had no remaining state remedies for the claim and therefore the claim was "technically" exhausted. See Coleman, 501 U.S. at 735 n.1, 111 S. Ct. at 2557 n.1.

The state superior court's preclusion ruling rests on an independent and adequate state procedural ground. As a result, the Court may not consider the claim on the merits absent a showing of cause and prejudice, or a fundamental miscarriage of justice.

Ordinarily "cause" to excuse a default exists if a petitioner can demonstrate that 'some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Coleman v. Thompson, 501 U.S. 722, 753, 111 S. Ct. 2546, 2566 (1991). Objective factors which constitute cause include interference by officials which makes compliance with the state's procedural rule impracticable, a showing that the factual or legal basis for a claim was not reasonably available to counsel, and constitutionally ineffective assistance of counsel. Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986). "Prejudice" is actual harm resulting from the alleged constitutional error. Magby v. Wawrzaszek, 741 F.2d 240, 244 (9th Cir. 1984).

In his first habeas petition, Petitioner argued futility as cause for the default, asserting that Arizona's death penalty statute had been found constitutional by both the Arizona and United States Supreme Courts. See LaGrand v. Lewis, No. CV-92-26-TUC-JMR, Memorandum Regarding Cause & Prejudice for Procedural Default on Issue of Lethal Gas (file doc. 158). Petitioner also alleged that the factual basis of the claim did not arise until the April 1992 lethal gas execution of Arizona inmate Donald Harding, the first such execution following reinstatement of the death penalty in Arizona, and the subsequent change in Arizona law adopting lethal injection as the default method of execution. See A.R.S. § 13-704. These arguments are unpersuasive.

Futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. "If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim." Engle v. Isaac, 456 U.S. 107, 130, 102 S. Ct. 1558, 1573 (1982). See also Noltie v. Peterson, 9 F.3d 802, 805 (9th Cir. 1993) (stating that futility argument is not viable). Significantly, the constitutionality of lethal gas was far from settled at the time of Petitioner's sentencing in 1984. Indeed, only one federal circuit had addressed the claim. See Gray v. Lucas, 710 F.2d 1048, 1060 (5th Cir. 1983) ("[N]either the Supreme Court nor any federal court has addressed the issue whether the gas chamber constitutes cruel and unusual punishment."). Cf. State v. Williams, 166 Ariz. 132, 800 P.2d 1240 (1987) (raising challenge to lethal gas in same time period as Petitioner LaGrand's sentencing and appeal).

Likewise, the factual basis of Petitioner's claim was reasonably available at the time he was sentenced. In Gray v. Lucas, a 1983 decision, the petitioner submitted eyewitness affidavits and scientific data attesting to the alleged painful nature of execution by lethal gas. 710 F.2d at 1058-60. The Gray court also noted that several states were switching from gas to lethal injection. Id. at 1060-61. Clearly, Petitioner could have discovered and presented a factual predicate for his lethal gas claim when he was sentenced in 1984.

Finally, the Court observes that the Ninth Circuit's ripeness determination does not provide cause for Petitioner's default. In his second petition for post-conviction relief, Petitioner argued that the state court should not find the claim precluded because it was not ripe until the execution date was set and he elected gas, citing the Ninth Circuit's decision in his case. However, the ripeness doctrine is solely an issue of federal court subject matter jurisdiction. *See* *Poland v. Stewart*, 117 F.3d 1094, 1104 ("An appellate court has a duty to consider sua sponte whether an issue is ripe for review."). Federal ripeness is irrelevant to whether Petitioner properly exhausted his claim pursuant to Arizona law. Indeed, in declining to review the petitioner's lethal gas claim in *Poland*, the Ninth Circuit specifically stated: "We need not decide whether this claim is valid, or even whether a claim is presented at all." 117 F.3d at 1104. Moreover, at the time Petitioner was sentenced, lethal gas was the only available method of execution. It was not until eight years later that Petitioner was presented with a choice in his method of execution.[3] During this time, Petitioner had a legal and factual basis to challenge lethal gas. Accordingly, Petitioner is unable to show cause for failing to present this claim to the Arizona courts in a procedurally proper manner.[4]

If a petitioner cannot meet the cause and prejudice standard, the Court still may hear the merits of a procedurally barred claim if the failure to hear the claim would constitute a "fundamental miscarriage of justice." Sawyer v. Whitley, 505 U.S. 333, 112 S. Ct. 2514 (1992). The "fundamental miscarriage of justice" exception is also known as the "actual innocence" exception. There are two types of claims recognized under this exception: (1) that a petitioner is "innocent of the death sentence," or, in other words, that the death sentence was erroneously imposed; and (2) that a petitioner is actually innocent of the capital crime. In the first instance, the petitioner must show by clear and convincing evidence that, but for a constitutional error, no reasonable factfinder would have found the existence of any aggravating circumstance or some other condition of eligibility for the death sentence under the applicable state law. Id. at 336, 112 S. Ct. at 2517. In the second instance, the petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851, 867 (1995). Petitioner is unable to demonstrate that either "miscarriage of justice" claim is applicable here.

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[3] Arizona adopted lethal injection as its default method in 1992. *See* A.R.S. § 13-704.

[4] Because Petitioner cannot establish cause for the default of his lethal gas claim, the Court declines to discuss prejudice. *See* *Thomas v. Lewis*, 945 F.2d 1119, 1123 n.10 (9th Cir. 1991).

CONCLUSION

All of Petitioner's claims except the challenge to lethal gas are subject to the restrictions imposed by 28 U.S.C. § 2244(b) and therefore the Court lacks jurisdiction absent authorization from the Ninth Circuit Court of Appeals. The Court has jurisdiction to entertain the lethal gas claim and Petitioner need not seek permission from the Ninth Circuit to file a successive petition on this basis. Nevertheless, Petitioner's lethal gas claim was not properly presented to the state's highest court and Petitioner has failed to establish cause and prejudice for the default, or that a fundamental miscarriage of justice will result if the claim is not decided on the merits. Accordingly, Petitioner's lethal gas claim is procedurally barred.

THEREFORE, IT IS HEREBY ORDERED:

(1) that the Clerk of the Court shall **STRIKE** Petitioner's Amended Petition for Writ of Habeas Corpus, Memorandum of Law in Support of the Amended Petition for Writ of Habeas and Motion for Stay of Execution, and exhibits thereto from Civil No. 92-26-TUC-JMR and **TRANSFER** the documents to a new action (Civil No. 99-95-TUC-JMR);

(2) that the Clerk of the Court shall **STRIKE** Respondents' Anticipatory Pleading in Opposition to Successive Petition for Writ of Habeas Corpus (file doc. 270) and Supplement to Anticipatory Pleading from Civil No. 92-26-TUC-JMR and **TRANSFER** the documents to Civil No. 99-95-TUC-JMR.

(2) that the prior grant of leave to proceed In Forma Pauperis shall continue to be in force in the new action;

(3) that Petitioner's Petition for Writ of Habeas Corpus by Person in State Custody (28 U.S.C. § 2254) is **DENIED** as to his challenge to lethal gas and that judgment shall be entered accordingly;

(4) that Petitioner's Petition for Writ of Habeas Corpus by Person in State Custody (28 U.S.C. § 2254) is **DISMISSED** for lack of jurisdiction as to the remaining claims;

(5) that Petitioner's Application for Stay of Execution is **DENIED**;

(6) that the Clerk of the Court shall make immediate telephonic notification of this Order to all counsel of record; and

(7) that the Clerk of the Court shall forward this Order by facsimile to all counsel of record, the Clerk of the United States Supreme Court, the Clerk of the United States Court of Appeals for the Ninth Circuit, and the Clerk of the Arizona Supreme Court.

DATED this 23rd day of February, 1999.

John M. Roll
JOHN M. ROLL
United States District Judge

Annex MG 46

MEMORANDUM OF LAW IN SUPPORT OF THE PETITIONER'S WRIT OF *HABEAS CORPUS* BY A PERSON IN STATE CUSTODY, *LAGRAND V. LEWIS*

(8 MARCH 1993)

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

KARL HINZE LaGRAND, Petitioner,	NO: CIV 92-026 TUC JMR
vs.	
SAMUEL LEWIS, Director, Arizona Department of Corrections, Respondent,	**MEMORANDUM OF LAW IN SUPPORT OF THE PETITIONER'S WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY (28 U.S.C. § 2254)**
GRANT WOODS, Attorney General of the State of Arizona Additional Respondent.	

The Petitioner, Karl Hinze LaGrand, through counsel, hereby submits this Memorandum of Points and Authorities to be considered with the Petition for Habeas Corpus that was filed in this matter.

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/ / /

/ / /

RESPECTFULLY SUBMITTED this 8th day of March, 1993.

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By Carla G Ryan
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

KARL HINZE LaGRAND,

Petitioner,

vs.

SAMUEL LEWIS, Director,
Arizona Department of
Corrections,

Respondent,

GRANT WOODS, Attorney General
of the State of Arizona

Additional Respondent.

NO: CIV 92-026 TUC JMR

TABLE OF AUTHORITIES TO
TO MEMORANDUM FILED ON
MARCH 8, 1993

The Petitioner hereby requests this Court to accept the attached Table of Authorities which should have been filed with the Memorandum to the Petition for Habeas Corpus that was filed on March 8, 1993.

RESPECTFULLY SUBMITTED this ____ day of March, 1993.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is not a simple case of a bank robbery that was badly bungled. It is the story of young boy, so emotionally abused and unloved, that he lashed out in an impulsive, uncontrollable rage,[1] possibly triggered by alcohol and drugs; however, the story does not end there. Even though the bank manager and the bank teller were unfortunate victims, the Petitioner has also now become a victim -- a victim of the system.

Upon being arrested, the Petitioner could not afford to retain counsel to represent him and to be his advocate. The Public Defender's Office in Pima County had a conflict; therefore, the Petitioner was assigned a court-appointed lawyer -- Tom Higgins. The record is unclear why, but after the majority of motions were prepared and filed, Higgins attempted to withdraw and then agreed to stay on the case but to let David Gerson assume the primary representation of the Petitioner.[2] Gerson was a inexperienced trial lawyer who had never handled a capital case prior to assuming responsibility of this "high profile" case. The morning of trial, the Petitioner requested that Gerson be removed. Simultaneously, Gerson requested to withdraw. Both requests were denied by the trial court.

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[1] It has now been discovered that this was not the first time that Karl had totally "lost control". On at least three other occasions this same type of uncontrollable, impulsive behavior was demonstrated.

[2] From this point, Higgins had no part in the representation of Karl LaGrand, not even as an advisor or consultant.

Eighteen witnesses were called -- only two of the eighteen were even asked a question by Gerson and they were merely perfunctory questions. A review of the record amply demonstrated that the Petitioner did not have an advocate on his behalf during his trial.

An ineffective claim was raised in the direct appeal and in the post-conviction process; however, no additional testimony was presented to establish that counsel's performance was below the accepted standard in Pima County, nor was expert testimony presented to substantiate the claim of ineffective assistance because the trial court refused to hold an evidentiary hearing. Thus, to date, there has been no evidence presented to show that the performance of trial counsel was below the standard acceptable in a capital case in Pima County at the time that this matter went to trial.

Petitioner was less that three months past his eighteenth birthday at the time of the crime. At the time of the trial, he was barely twenty. This was a capital case. The publicity and community pressure were extremely high and the community was demanding the death penalty. The Petitioner never had a full and fair hearing with an advocate to represent him at the guilt phase or at the penalty phase. Likewise, he has never had a full and fair hearing on the question of competency of counsel at the trial level and at the appellate level.

Upon investigating this case in order to prepare for this Petition for Habeas Corpus, undersigned counsel have located several witnesses[3], as well as court documents and school records which provide numerous factors that should have been presented at the aggravation/mitigation hearing in this matter. Trial counsel did not reasonably investigate the case, nor did he seek out these records and present them to the trial court in an effort to save the Petitioner's life.

As indicated above, no court has ever held an evidentiary hearing on these claims of ineffectiveness. The Ninth Circuit Court of Appeals recently held in Hendricks v. Vasquez, No. 91-16631 (1992) U.S.A. pp. Lexis 20516 (9th Cir., 9-2-92), that the petitioner in that case had a right to an evidentiary hearing when there had never been one before. Hendricks' claims of ineffective assistance of counsel at the guilt and penalty phases centered on his trial counsel's failure to investigate Hendricks' background in order to present a mental impairment defense. The court held that, without an evidentiary hearing, it could not determine whether counsel's failure to call any defense witnesses during the guilt phase constituted deficient performance. As for the penalty phase, the District Court rejected Hendricks' claim by relying in its assertion that the facts of Hendricks' childhood were undisputed and that any testimony that Hendricks' family members could have given concerning Hendricks' childhood would have been cumulative. The Ninth Circuit, however, held that since one of the prosecution's principle strategies at trial was to establish that Hendricks was probably lying about his dramatic childhood, and since defense counsel presented no direct evidence to establish those facts, such evidence may have been useful and not cumulative. Therefore, the court held that without an evidentiary hearing, it could not determine whether counsel's performance had a probable effect on the outcome of the penalty phase.

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[3] Several of which could have been reasonably located at the time of trial.

In the present case, the Petitioner has raised similar issues as in Hendricks; and, as in Hendricks, has never received an evidentiary hearing. The prosecutions strategy with Dawn Lopez's testimony was to show the premeditated nature of the Petitioner's acts, and to negate an impaired mental state. Therefore, as in Hendricks, an evidentiary hearing is required.

In addition, the Seventh Circuit Court of Appeals has opined that a trial counsel's failure to conduct a reasonable investigation to discover readily available evidence regarding the Petitioner's I.Q., susceptibility to influence of friends, and disadvantaged background, constituted ineffective assistance of counsel and requires the vacation of a death sentence and a remand for a new penalty trial. Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991).

It is therefore respectfully requested that this Court not only consider the cumulative effect of all of the allegations of ineffectiveness, as well as the claims of other errors, but also to grant an evidentiary hearing so that the Court will have the benefit of all of the evidence before it in considering granting relief.

II. FACTS.

Shortly before 8:00 a.m. on the morning of January 7, 1982, Ronald M. Shunk, Jr. arrived at work in Marana, Arizona for the purpose of opening the El Taco fast food restaurant which he managed. T. 2/7/84, pp. 732-737. The restaurant was located immediately adjacent to a local Valley National Bank. Id.

As Mr. Shunk drove through the parking lot which was common to both businesses, he noticed several vehicles in the immediate area. Id. As he got out of his car, another car, a four-door, white Plymouth with a brown top drove in. Id. 742-743. The occupants, half-brothers Walter and Karl LaGrand, T. 2/15/84, p. 35, pulled up, and the driver, Walter, rolled down his window and asked the time the restaurant opened. T. 2/7/84, p. 739. Mr. Shunk responded that it opened at 9:00 a.m. Id. pp. 739-740. Walter then asked what the current time was and Mr. Shunk responded that it was ten minutes of eight. Id.

At about 8:00 a.m. Valley National Bank teller Dawn Lopez arrived for work. Id. p. 827. As she pulled into the parking lot she noticed three vehicles in the lot, a motor home, an unidentified vehicle, and the pickup truck of Mr. Kenneth Hartsock, the Valley National Bank branch manager. Id. pp. 827-828. Ms. Lopez drove into the parking lot and then, realizing that she was early to work, left for a brief drive through Marana. Id. pp. 827-830. In part she left the parking lot because she thought that the manager, Mr. Hartsock, might be inside the bank conducting some personal business before the other employees arrived. Id. p. 830.

She drove around the Marana area for about three or four minutes and then returned to the bank. Id. p. 830. Upon her return, she saw Karl LaGrand and Mr. Hartsock standing outside the bank's main doors. Id. p. 831. She noticed that a white car with a brown top was also parked in the lot. Id. By this time, Karl LaGrand and Mr. Hartsock were inside the bank. As Ms. Lopez got up to the sidewalk which runs parallel to the bank entrance, Walter LaGrand got out of the car and asked what time the bank opened. Id. pp. 832-834. Ms. Lopez replied that it opened at 10:00 a.m. Id.

Ms. Lopez walked up the steps to the bank entrance and opened the door, which she noticed was unlocked. Id. p. 835. When she walked inside, she noticed that Mr. Hartsock was standing at the vault next to Karl LaGrand. Id. p. 835. Karl was dressed in a coat and tie Id. p. 837, and he had a briefcase. See T. 2/15/84, p. 106. Karl told her to come inside and "sit down", pointing to a nearby chair. Id. p. 837. Karl opened his jacket and exposed the butt of a gun,[4] which was struck inside his pants. Id. p. 838. He also had an earpiece in his ear, Id. p. 852, which was connected to a police radio scanner. T. 2/15/84, pp. 1113-1114.

As Ms. Lopez moved to sit down, Walter LaGrand entered the bank. Id. p. 840. Karl ordered Mr. Hartsock to open the bank vault. Id. p. 841. After a few minutes of frustration regarding their unsuccessful efforts to persuade Mr. Hartsock, the pair remarked that if Mr. Hartsock would not open the vault then, he and Ms. Lopez would be shot. Id. p. 842. Mr. Hartsock replied that he could not open the vault alone. Mr. Hartsock and Ms. Lopez were then moved into the manager's office. Id. p. 844. The office was arranged with a desk, a credenza, an office chair and several customer chairs. Id. p. 845. Mr. Hartsock and Ms.Lopez were ordered to sit in the customer chairs and to face the wall. Id. p. 846. At this point, the brothers used black electrical tape to bind the victims' hands behind their backs. Id. p. 846. Walter then threatened Mr. Hartsock, indicating that if he did not tell how to open the vault he would be killed. Id. p. 848. While this threat was made, Walter held a letter opener from Mr. Hartsock's desk to the victim's throat. Id. pp. 848-849. In response, Mr. Hartsock truthfully indicated that he could not open the safe by himself; however, he lied when he said a security guard would soon be arriving to open the safe. Id. p. 848. At this point, a bandanna was stuffed into the mouth of each victim. Id. p. 849.

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[4] The gun was a toy pistol that Karl obtained from Zody's Department Store. [*See*, Exhibit A from Hearing of June 27, 1983, p. 4 of Karl's first confession, *See*, also T. 2/16/84, pp. 1213-1219].

The telephone located on Mr. Hartsock's credenza began to ring. Id. p. 852. The caller was Wilma Rogers, a fellow bank employee. Id. p. 852. Ms. Rogers had arrived at the bank at about 10 minutes after 8:00 a.m. Id. p. 775. As she entered the parking lot, she noticed two unfamiliar vehicles in the parking lot, and she became nervous. Id. pp. 777-778. One of the vehicles was Karl's and Walter's white and brown car. Although the security signal[3] in the bank window indicated that everything was normal, Ms. Rogers had "some sort of feeling" that all was not well. Id. p. 780. As a result, she noted the license plate numbers of the unknown cars on the edge of a grocery bag she found in her car. Id. p. 781; See, also Exhibit 50. She noted that the license plate number of the white and brown vehicle was TXK-749. Id. p. 783.

After recording the license plate numbers of the unfamiliar vehicles, Ms. Rogers went around the corner to a local grocery, the K&M Market. Id. p. 783. At this location, she asked to use the store's telephone and she called to the bank. Id. p. 784. Ms. Rogers answered the telephone. Id. p. 784. During a brief conversation, Ms. Rogers asked to speak with Mr. Hartsock and Ms. Lopez replied that he was not there. Id. p. 785. This struck Ms. Rogers as odd since she had previously noted that Mr. Hartsock's tan pickup truck was also parked in the bank parking lot. Id. p. 785. Continuing her conversation, Ms. Rogers advised Ms. Lopez that her car headlights were still on, as indeed they were. Id. p. 786. Ms. Rogers advised that if Ms. Lopez would go out and turn off her headlights then she, Ms. Rogers, would feel comfortable entering the bank. Id. p. 786. The conversation then ended. The telephone conversation with Ms. Lopez worried Ms. Rogers and she began to suspect that something was wrong at the bank. After waiting a short while, she asked the son of the store's owner, Ken Botkin, to call again to the bank. Id. p. 787. Mr. Botkin did so and asked for Mr. Hartsock. He was told that Mr. Hartsock was not there. Id. p. 788. At this point, Ms. Rogers called the Marana Town Marshall's Office. Id. p. 788.

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[3] The bank used "signals" to indicate to employees whether the bank building was secure. For example, each morning, after the building had been completely checked out by the first employee entering the premises, the blinds in the front window were lowered and a plastic bank card advertisement was placed in the window. [T. 2/7/84, p. 780].

While Ms.Lopez was talking to Ms. Rogers, Karl LaGrand had been listening in on the conversation. Id. pp. 851-852. After hanging up the phone, Ms. Lopez reported that if she did not go out and turn off her headlights than Ms. Rogers would call the sheriff. Id. p. 855.

At this point, the brothers removed the tape from Ms. Lopez' hands and one of them escorted her to the bank door. Id. pp. 857-859. Before being permitted to go outside, she was told that if she tried to get away, Mr. Hartsock would be shot. Id. p. 857.

Ms. Lopez went to her car, unlocked it, turned off her lights, and then returned to the bank. Id. pp. 857-859. As she re-entered she was escorted back to the manager's office, where her hands were re-taped. Id. p. 860. At this point, Karl and Walter began to become agitated. They were extremely nervous. Id. p. 907. Ms. Lopez was ordered to sit in a chair and face the wall. Id. p. 862. After a brief period, as she sat facing the wall, she "heard some struggling". Id. p. 862. Thinking that the robbers might be hurting Mr. Hartsock, she stood up and broke the tape off of her hands. Id. p. 863. She turned toward Mr. Hartsock and, for an instant, saw Mr. Hartsock struggling with the two men.[6] Id. p. 863. She saw Mr. Hartsock was facing the window and Walter was in front of him. Id. p. 863. Karl was in back of Mr. Hartsock, holding him by his shoulders. Id. p. 863. She could not tell what the robbers were doing. Id. pp. 863-864. All of this took place in just a few seconds. Id. p. 864.

She recalled that almost immediately thereafter Walter came after her. Id. p. 864.[7] She raised her hands to protect herself and she was repeatedly stabbed. Id. p. 865. She fell to the ground and lay on her right side against the north wall of the room. Id. p. 865. In great pain, she could only recall seeing the "scuffling of feet and movements". Then, she saw Mr. Hartsock lying on the floor on his stomach. Id. p. 866. She heard someone repeat twice, "just make sure he's dead". Id. pp. 866-867. The pair then fled, and Ms. Lopez immediately got up and locked the bank doors. Id. p. 869.

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[6] Walter LaGrand denied participating in the stabbing. T. 2/15/84, pp. 66-69. Walter also called eye witness expert Geoffrey Loftus, who offered a plausible response on this point. In his testimony, Dr. Loftus identified certain variables with regard to the events of January 7, 1982 which could have adversely affected Ms. Lopez's memory of these events. T. 2/16/84, Testimony of Dr. Loftus, passim. Among others, he identified "extreme stress" and a witnesses' "expectations" as factors. Id. The record indicated that Ms. Lopez was under extreme stress and it suggests that since before the stabbing, she once saw Walter hold a letter opener to Mr. Hartsock's throat, T. 2/7/84, p. 905, she anticipated seeing a similar incident when she heard the struggling and turned to help Mr. Hartsock. T. 2/8/84, p. 290, lines 16-25 through p. 921, lines 1-24.

[7] See footnote 6, infra.

Walter stated that immediately after the stabbing Karl was "shaking and crying". He ordered Karl to lay down in the back seat of their car. On the ride back to Tucson, Karl was breathing very heavily and his nose was bleeding. He was "still in shock". RT Vol. 9 p. 9, 1105.

Meanwhile, Ms. Rogers again called the bank. Id. p. 805. Ms. Lopez answered the phone and screamed for help. Id. p. 806. Ms. Rogers immediately called for assistance. Id. p. 806. Law enforcement and medical personnel soon arrived. T. 2/8/84, p. 955. The first person on the scene was medical technician Anna Garrison. Id. She looked through the bank's glass doors and saw Mr. Hartsock's legs sticking out past the door to the managers' office. Id. p. 955. Ms. Lopez was found sitting nearby on the floor with a phone in her hand. She was all covered with blood. Id. p. 956.

Mr. Hartsock was lying face-down the floor, his hands tied behind his back with electrical tape. Id. p. 956. His pulse was checked and none was found. Id. p. 957. An autopsy subsequently revealed that Mr. Hartsock had sustained 24 stab wounds to his upper torso and neck. T. 2/9/84, p. 1045. Any of the four wounds to Mr. Hartsock's heart would have been fatal. Id. p. 1046. The majority of the wounds that Mr. Hartsock sustained were stabs wounds made by a sharp object. Id. p. 1046. The majority of the wounds were consistent with those which could be made with a steak knife, T. 2/9/84, p. 1051; or a letter opener.* T. 2/9/84, p. 1050;

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* There was testimony at trial that some of the wounds could have been made with a steak knife or serrated edged instrument and others by a straight edged instrument

T. 2/7/84, pp. 791-792.

Dawn Lopez remained conscious and was immediately taken to the University of Arizona Hospital in Tucson. T. 2/7/84, p. 874. She suffered from multiple stab wounds to her neck, arm and torso. Id. pp. 875-876.

The crime scene was secured by police. T. 2/7/84, 1984, pp. 762-770. A number of photographs were taken of the interior of the bank manager's office and certain physical evidence was seized. The physical evidence included a bloody bandanna, a steak knife, and the sheath to Mr. Hartsock's desk letter opener. Id. pp. 764-767.

The officers at the crime scene also immediately began an investigation to locate the suspects. The license plate numbers obtained from Ms. Rogers were checked through the Department of Public Safety and the name and address of the owner of the white and brown vehicle was obtained.* T. 2/8/84, pp. 963.

This lead was followed and at approximately 3:00 p.m. on January 7, a white and brown Plymouth was located at an apartment in Tucson. Id. p. 964. F.B.I. and D.P.S. agents set up surveillance on the car. Id. p. 964. After a brief time, three individuals, two men and a woman, were seen leaving an apartment and entering the suspect vehicle. Id. p. 965. The car was followed out of the parking lot and soon stopped. Id. p. 965-966.

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such as a letter opener.

* The car was owned by the father of Walter LaGrand's girlfriend, Karen Libby. T. 2/8/84, pp. 971.

The men in the car were Karl and Walter LaGrand. Id. pp. 965-968. The female passenger was Karen Libby. The men were arrested and the car was searched. A Realistic brand police scanner was found underneath the seat of the car. Id. pp. 969-970.

The apartment from which the brothers were seen leaving was rented by Karen Libby. Id. pp. 971-972. That apartment was subsequently searched and a steak knife similar to the one found in the bank was seized. Id.

Walter and Karl LaGrand were taken to the Department Public Safety headquarters in Tucson, Arizona where they were detained and questioned. That evening and early the next morning, Karl LaGrand, while under a great deal of stress, gave two separate confessions to Deputy Sheriff Barkman, one at the D.P.S. headquarters, T. 7/5/83, pp. 42-49, after Deputy Barkman slapped Karl on his face because Karl was becoming hysterical, and one at St. Mary's Hospital where Karl was taken because he was hyper-ventilating. T. 7/5/83, pp. 49-57; T. 6/28/83, pp. 6-9, 16, 19-20. In these statements, Karl said that he alone stabbed Mr. Hartsock and Ms. Lopez and that Walter LaGrand was not in the room during these events. T. 2/16/84, pp. 1213-1219. Karl indicated that he stabbed Mr. Hartsock because Mr. Hartsock kicked him in the leg[10] when Karl was alone in the room with the victims and that in a panic, he, Karl, picked up a letter opener from Mr. Hartsock's desk and stabbed first Mr. Hartsock and then Ms. Lopez. Id.[11]

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[10] At trial, on cross examination, Ms. Lopez acknowledged that just before the stabbing one of the brothers made a move toward her and that Mr. Hartsock kicked the leg of the man making this move. T. 2/8/84, pp. 933-936. She also acknowledged that the stabbing occurred immediately after this incident. The precipitating kick was corroborated by the report of the emergency room physician who treated Karl at St. Mary's Hospital. He was taken there because of his mental state the night of his arrest.

Karl's statements differ from Ms. Lopez' account. Using Dr. Loftus' testimony regarding extreme stress, these inconsistencies can be explained. For example, Dr. Loftus testified that an individual's memory can be adversely affected when that individual is under "extreme stress". The record is clear that Karl was under extreme stress, to the point of being hysterical during the crime, after the crime and during his interrogation at Department of Public Safety headquarters and when he was transferred to St. Mary's Hospital.

On February 15, 1982, Donald Stone was walking with his wife through a residential desert area in Tucson, Arizona when he observed a youth, Carlos Tejeda, drop a briefcase which he had been carrying. T. 2/9/84, pp. 984-989; 990-991. Carlos had found the briefcase while walking through a neighborhood wash[12] after leaving his baby sitters house and heading for home. Id. p. 984. Carlos dropped the briefcase when he became concerned that it might belong to Mr. Stone. Id. p. 988. Mr. Stone retrieved the suitcase and the following day took it to a lock and key shop to have it opened. Id. pp. 991-993. When he looked at the contents, he noticed that the briefcase contained a toy pistol, a bandanna, some black tape and a letter opener. Id. p. 993.

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[11] At trial Walter LaGrand testified on his own behalf. He said that after the phone call from Ken Botkin, the pair decided to leave. T. 2/15/84, pp. 64-69 (morning session). The stabbing occurred when, he said, he was out in the bank's parking lot, where he had gone to start the getaway car. Id. When he got to the car, he could not find the car keys and so he returned to the bank and the manager's office. Id. When he returned, he found his brother crying and shaking, "I killed him. I didn't mean to do it. I panicked. He kicked me." Id. p. 68. Walter LaGrand attempted to introduce Karl's two confessions into evidence, but his request was denied. T. 2/16/84, pp. 1211-1219.

[12] Walter LaGrand testified that he threw the briefcase and its contents into the wash on the day of the attempted robbery. T. 2/15/84 (afternoon session), p. 1106.

A few days later, Mr. Stone and an officer from the Pima County Sheriff's Department met. Id. pp. 993-994. The briefcase was turned over to the deputy who inventoried its contents. Id. pp. 997-998. It contained a chrome colored toy pistol with a black plastic grip, some crumpled pieces of electrical tape, a red bandanna, a radio ear jack, Mr. Hartsock's letter opener, Ms. Lopez's key ring and Karl's dark brown sports jacket and black clip-on tie. Id. p. 999.

III. PROCEDURAL HISTORY.

Karl and Walter LaGrand were arrested on January 7, 1982. On January 14, 1982 an Indictment was issued charging the Petitioner with six counts: First Degree Murder, Attempted Murder, Armed Robbery, Aggravated Robbery, and two counts of Kidnapping. The arrest and indictments arose out the robbery of a Valley National Bank in Marana, Arizona.

Tom Higgins was appointed to represent Karl LaGrand on January 14, 1982. On May 25, 1983, the Petitioner moved to suppress his confessions made immediately after his arrest. On June 13, 1983, David Gerson, the Petitioner's second appointed attorney, was appointed to represent him."[13] The Court granted the motion to suppress on September 19, 1983.

On September 23, 1983, the Petitioner, through Gerson, made a motion, pursuant to Rule 11 of the Arizona Rules of Criminal Procedure, for the appointment of an expert to examine the Petitioner's mental state. That Motion was withdrawn on January 30, 1984, the day before the trial.

The Petitioner's trial began on January 31, 1984. He was found guilty on all counts by the jury on February 17, 1984, and was sentenced to death on December 14, 1984.

The Petitioner immediately appealed his case on automatic appeal to the Arizona Supreme Court with a newly appointed attorney representing him. Both brothers' cases were affirmed by the Court in State v. LaGrand, 152 Ariz. 483, 733 P.2d 1066 (1987), and State v. LaGrand, 153 Ariz. 21, 734 P.2d 563 (1987). See exhibits to Habeas Petition. The United States Supreme Court denied certiorari.

A Petition for Post Conviction Review was filed on behalf of the Petitioner on December 11, 1987, and was denied on September 27, 1990, without an evidentiary hearing being granted. A Petition for Writ of Certiorari was filed in the United States Supreme Court and was denied on September 13, 1991.

Petitioner filed his Preliminary Writ of Habeas Corpus on

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[13] Although Tom Higgins's Motion to Withdraw was denied, and the Court appointed Gerson as an "associate counsel". Higgins played no more role in Karl LaGrand's defense. Not even as an advisor or consulate.

January 16, 1992.

IV. LEGAL ISSUES

A. Ineffective Assistance of Counsel

1. Ineffective assistance of counsel at trial

A criminal defendant has a constitutional right to competent counsel. Whether counsel is retained or appointed does not make a difference -- all counsel are judged by the same standard. Cuyler v. Sullivan, 446 U.S. 335, 344-45, 100 S.Ct. 1708, 1716 (1980); United States Constitution, amendment six.[14] That does not mean that a defendant is entitled to an error-free trial, Young v. Zant, 677 F.2d 792, 798 (11th Cir. 1982); however, if counsel's conduct at trial, viewed in the context of the totality of circumstances, falls below the range of competency generally demanded of attorneys in criminal cases, a criminal conviction obtained through such a trial unconstitutionally deprives the defendant of his liberty. Id., Cuyler v. Sullivan, supra, 446 U.S. at 344; McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970).

In Arizona, it is well established that the test for ineffectiveness of counsel is that a defendant must prove that counsel's representation was not reasonable under all of the circumstances, i.e., that it was deficient, and that counsel's deficient performance prejudiced the defendant. State v. LaGrand, 152 Ariz. 483, 733 P.2d 1066, 1068 (1987); State v. Rossi, 146

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[14] Amendment Six is applicable to the states through Amendment 14 of the United States Constitution.

Ariz. 359, 364, 706 P.2d 371, 376 (1985).

Arizona's test for ineffectiveness is modeled after the United States Supreme Court's test fashioned in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). See e.g., State v. Salazar, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

Strickland defines the minimal competence level required by counsel. Proof of deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the sixth amendment." Strickland, 466 U.S. at 686. The question that needs to be answered is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

The Strickland court went on to specify that where "there is a reasonable probability that, but for counsel's unprofessional errors", the "result would have been more favorable to the defendant there will be prejudice". Id. at 694-95 (emphasis added).

This standard set forth in Strickland is lower than the preponderance of the evidence standard. Id.; Chambers v. Armontrout, 885 F.2d 1318 (8th Cir. 1989). "Reasonable probability is a probability sufficient to undermine confidence in the outcome". Strickland at 694.

The sixth amendment guarantee of right to counsel exists "in order to protect the fundamental right to a fair trial". Id., 104 S.Ct. at 2063. A fair trial is defined as "one in which evidence, subject to adversarial testing, is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding". A fair trial is meant to insure that the "result is reliable". Id.; State v. Carriger, 143 Ariz 142, 692 P.2d 991 (1984), cert. den., 105 S.Ct. 2347 (1985). Therefore, the focus when a defendant raises a competency of counsel claim is not whether counsel erred, but whether the defendant had a fair trial. See also, State v. Gerlaugh, 144 Ariz. 449, 456, 698 P.2d 694, 701 (1985).

The defendant must prove both prongs of the Strickland test: that counsel's representation was not reasonable under all the circumstances and that the defendant was prejudiced by counsel's conduct. State v. LaGrand, supra; State v. Salazar, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985); see also, State v. Nash, 143 Ariz. 392, 694 P.2d 222 (1985).

Attached as Exhibit J to the Petition for Habeas Corpus, the Petitioner has identified numerous separate and distinct examples of incompetency of his trial lawyer during the pre-trial and trial stages. Those allegations include the failure to maintain a relationship with the Petitioner, failure to interview witnesses, failure to develop defenses, failure to investigate the Petitioner's state of mind at the time of the offense, as well as at the time of the confession, and at the time of trial and at the time of sentencing, failure to hire and utilize experts, failure to file necessary motions, and a failure to be an advocate for the Petitioner rather than a "neutral observer".

In State v. Moyer, 151 Ariz. 253, 727 P.2d 31 (App. 1986), the

Arizona Court of Appeals found that counsel was deficient in not objecting properly during expert witness testimony coupled with the fact that counsel didn't interview witnesses until the first day of trial.

In the present case, counsel merely relied on interviews that others had done rather than to interview witnesses, lay and expert, himself. Additionally, he not only didn't object to questionable witness testimony, counsel basically did not participate at all -- not even to the extent of questioning of the witnesses, let alone making proper objections.

In State v. Edwards, III, 139 Ariz. 217, 677 P.2d 1325 (App. 1983), the Arizona Court of Appeals held that when an insanity defense is presented that "special care" is necessary and failing to personally confer with a doctor was ineffective. In the present case, insanity was listed as a defense by Karl LaGrand's lawyer; however, it was never properly developed. Likewise, counsel totally failed to investigate, develop or even to raise the defenses of impulsivity and/or temporary insanity. See, State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981).

In State v. Bush, 148 Ariz. 325, 714 P.2d 818 (1986) ineffective assistance of counsel was found where there was a mishandling of crucial testimony as to the entry point of the bullet; lack of interviewing witnesses for trial; failure to interview medical experts until the day the medical expert was to testify; and counsel's failure to listen to a tape of a witness which he had access to for over one year.

In the present case, it is obvious that counsel for both defendants were surprised when the pathologist testified that the stab wounds could have been caused by two different types of instruments, i.e., a serrated-edged steak knife and a straight-edged letter opener. See Petition for Post-Conviction Relief filed by Walter Lagrand, Exhibit F, attached to Habeas Petition. Therefore, there was not just a "mishandling" of this crucial evidence, there was a total lack of handling of this crucial evidence. This was like having a "bomb" fall in the middle of trial before the jury.

Again, Karl Lagrand's attorney admitted that he relied on interviews of witnesses that others, prior attorneys, or the co-defendant's attorney, had performed. He did not have his own investigator. He also failed to properly prepare or educate his mental health expert. He failed to provide his mental health expert with all of the necessary documents so that the mental health expert could make informed judgments utilizing all of the information available.

The record also reflects that Karl LaGrand's attorney failed to have a clear understanding of his own case. This is demonstrated by his complete reversal from originally requesting Karl LaGrand's confessions be suppressed and then changing his mind and requesting the trial court to reverse the suppression order just prior to preceding to trial. This complete change of strategy at the last moment further supports the lack of pre-trial investigation and preparation which is essential in any case and even more so in a capital case.

Counsel further failed to assure that the Petitioner was tried before an impartial jury, No objections to the manner of the selection of potential jurors, not to the pay received were ever made. The failure to do so resulted in a class of individual, self-employed, or individuals who exists on "tips" or work for small companies, from sitting on this jury.

The Arizona Supreme Court has held that counsel may be ineffective on a motion for new trial if counsel failed in his required duty to use the skill, thoroughness and preparation reasonably necessary to provide effective assistance of counsel. This can be established by a failure to investigate and present necessary evidence. State v. Fisher, 152 Ariz. 116, 730 P.2d 825 (1986).

In the present case, counsel did not use the skill, thoroughness and preparation necessary to provide effective assistance at trial, sentencing or on the motion for new trial. The Arizona Supreme Court even said in its opinion:

> Although trial counsel here kept an exceedingly low profile, we cannot say that his performance was so deficient as to compromise the adversarial nature of the trial.
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> . . . .
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> Counsel could have presented the appellant's case more fully and skillfully. Nonetheless, the test for counsel's ineffectiveness is not whether a better job could have been done, but whether his performance fell below the minimum threshold of professional skill established by case law. We hold that counsel's

> representation of appellant was not ineffective.

State v. LaGrand, id. 152 Ariz. 486.

Because counsel failed to investigate and present evidence which would have established the defense of impulsivity, the Petitioner was prevented from presenting his defense and thereby prejudiced. Present counsel have investigated and are prepared to present evidence which supports this defense. Dr. Timothy Derning, after reviewing hundreds of pages of documents, reviewing interviews and spending over 10 hours with the Petitioner, has uncovered several incidents which support a major character flaw in the Petitioner which makes him "freak out" and act impulsively without any intent or without control over his behavior.[15] Even though trial counsel alluded to this type of defense during his closing arguments, it was never investigated or prepared so that it could be effectively presented to the jury.

This case went to the jury on both kinds of murder -- felony murder and premeditation. Evidence was presented on both. The record does not reveal what theory the jury found the Petitioner guilty under. Therefore, this was a viable defense that was not presented and could have affected the outcome of the trial.

Even though Arizona adheres to the M'Naghten test for insanity, the defense may introduce evidence of the defendant's impulsive nature to prove that the defendant is incapable of premeditation. State v. Christensen, 129 Ariz. 32, 35, 628 P.2d 580, 583 (1981). In Christensen, the defendant did not deny killing his ex-wife, but he wanted to introduce psychiatric testimony to the effect that the defendant had difficulty dealing with stress and that in stressful situations his actions were more reflexive than reflective. Id. at 34. The defense argued that this testimony was admissible under Arizona Rules of Evidence 404(a)(1). Id. The trial court rejected the defendant's testimony, believing that it would raise the defense of diminished responsibility that the Arizona Supreme Court has rejected in State v. Schantz, 98 Ariz. 200, 206, 403 P.2d 521, 525 (196), cert. den., 382 U.S. 1015 (1966).

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[15] In the transcripts of the interrogation by Weaver Barkman, Karl states, "I wasn't me, goddamit it." Throughout the interrogation and at other times, Karl states clearly, "I didn't mean to do it." It is following this description that Karl says, "I wasn't me."

The Arizona Supreme Court reasoned that preventing a defendant from offering evidence to dispute any of the elements of a charge against him is "inconsistent with fundamental justice" and held that the trial court erred in refusing the psychiatric testimony because "the establishment of the character trait of acting without reflection tends to establish that appellant acted impulsively. From such a fact, the jury could have concluded that he did not premeditate the homicide." Id. at 35-36. However, an expert witness may not testify concerning whether the defendant acted impulsively at the time of the killing. Id. at 35-36.

The Arizona Supreme Court reaffirmed this limitation in State v. Hallman, 137 Ariz. 31, 668 P.2d 874 (1983). In Hallman, the defendant claimed that the trial court erred in granting the

State's motion in limine prior to the commencement of trial to preclude any expert testimony regarding whether the defendant was acting reflectively or reflexively during the alleged criminal offense. Id. at 35. The court explained that "such testimony may only be used as evidence that the defendant possesses such a trait and it must be left to the jury to determine whether and how the trait affected the defendant's specific intent at the time of the alleged crime." Id. (citing State v. Hicks, 133 Ariz. 64, 71, 649 P.2d 267, 274 (1982); State v. Dickey, 125 Ariz. 163, 169, 608 P.2d 302, 308 (1980) (internal citations omitted). The court found that the trial court had correctly limited the scope of the experts' testimony in order to comply with State v. Dickey and State v. Christensen and prevented "inadmissible evidence from being suggested to the jury." Id.; see also State v. Arnett, 158 Ariz. 15, 22, 760 P.2d 1064, 1071 (1988) (holding that the trial court's exclusion of proffered psychiatric testimony was proper where the proposed testimony did not show a character trait of impulsivity, but rather showed the defendant's probable state of mind at the time the offense occurred); State v. Rivera, 152 Ariz. 507, 514, 733 P.2d 1090, 1097 (1987) (affirming trial court's exclusion of expert testimony dealing only with the defendant's probable state of mind at the time of the offense instead of testimony as to a general personality trait of the defendant).

Additionally, prejudice occurred because trial counsel failed to zealously represent his client. He was not an advocate for Karl LaGrand. The jury could only have been lift with the impression that David Gerson was merely a "neutral observer"; his conduct undermined the proper functioning of the adversarial process. This is demonstrated by the affidavits attached as Exhibits B, C, D, E, F, G, H, I, J, to this Memorandum.

The Eleventh Circuit has held, based on the record of the trial alone, that it was plain that the trial attorney did not accord the defendant even a "modicum of professional assistance at any time" and therefore was ineffective. *Young v. Zant*, *supra* 677 at 794-95. In that case, the attorney was unaware of the fact that guilt and penalty were decided in separate proceedings and he conceded guilt.

As stated earlier, even the Arizona Supreme Court held that Mr. Gerson was not an aggressive advocate for Karl LaGrand. Karl LaGrand never received an independent professional to represent him in a zealous fashion. As indicated by Mr. Burke's affidavit, Exhibit D, he was not concerned with Karl's case, he was representing his own client, Walter LaGrand; therefore, Karl was not constitutionally represented by counsel during his capital trial and even if Walter LaGrand was, that doses not cure the prejudice felt by Karl LaGrand.

Under Strickland, counsel must conduct a reasonable investigation or make a reasonable decision not to investigate.[14] In *Agan v. Dugger*, 835 F.2d 1337 (11th Cir. 1987), the court found that when a record reflects that an attorney did not spend "much time" on a capital case, i.e., no legal research, no interviews, no development of defenses, no competency hearing (when there has been a history of mental problems), that an evidentiary hearing is necessary and if there was not one provided at the state level, it should be done in the Federal District Court because there is enough on the record to establish ineffective assistance.

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[14] The ABA Standards for Appointment of Counsel and NLADA Standards also set forth what needs to be done in a capital case. [See Exhibit K and L].

In the present case, a review of the request for payment of attorney fees establishes how little work was done on behalf of the Petitioner by his trial counsel. The fee vouchers speak for themselves. See Exhibit M. Likewise, a review of the record demonstrates the lack of work that was completed in this case. It also discloses a lack of any kind of true adversarial representation. Eighteen witnesses were called during the guilt phase in the particular case and defense counsel for Karl LaGrand only asked two witnesses perfunctory questions. Counsel, even though being present, acted as a "neutral observer", rather than an advocate for Karl LaGrand. In order to be effective, it is imperative that the attorney representing a defendant act in such a way that the adversarial process in not undermined. Strickland, supra Even Mr. Gerson acknowledges that he would have done things much differently if appointed on this case today. His inexperience, late appointment and lack of special training prevented him from giving Karl LaGrand effective assistance of counsel in this capital murder case.

Finally, the system that is used in Pima County violates a defendant's constitutional right under the fifth, sixth and fourteenth amendments to the United States Constitution, as well as Article II, §§ 4 and 24 of the Arizona Constitution, and the Arizona Rules of Professional Responsibility, Rules of the Arizona Supreme Court, 17a A.R.S.

In Pima County, there are no standards set forth for appointment of counsel and there are no assurances effective counsel will be appointed, that even though the State Supreme Court has indicated that in capital cases they expect vigorous representation, there has been no standard set forth to assure that vigorous representation, i.e., competent representation, occurs in these cases. See, State v. LaGrand, supra, 733 P.2d at 1069. See also, ABA Standards, Exhibit K, and NLADA Standards, Exhibit L.

2. Ineffective assistanc of counsel at sentencing

There was literally no aggravation/mitigation hearing presented on behalf of Karl LaGrand. The court was not thoroughly informed about the family dysfunctional history, the Petitioner's mental health history and his inability to properly deal under extreme stress, his abused childhood and his character flaw which results in his acting in an uncontrollable impulsive manner when under extreme stress.

Ineffective assistance of counsel has been found when counsel refused to present any evidence or otherwise participate at a sentencing. State v. Carriger, supra, 143 at 148, 692 P.2d at 997 (1984).

In State v. Perkins, 141 Ariz. 278, 686 P.2d 1248, 1265 (1984), at sentencing, the defendant was not represented by his trial counsel, but by substitute counsel, who indicated to the court that he was not familiar enough with the case to make a statement. The Arizona Supreme Court concluded that this was a denial of effective assistance of counsel. The court held that counsel's role was no more significant than that of a neutral observer. Id. There was no attempt to present any mitigating evidence. Id. Thus, there was no competent representation at sentencing. Id.

In another similar situation, State v. Cruz, 137 Ariz. 541, 672 P.2d 470 (1983), the Arizona Supreme Court found ineffective assistance as a result of non-participation of defense counsel when he became convinced that the trial judge was prejudiced against his client. See also, Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988); State v. Gerlaugh, supra; ABA Standards (Exhibit K).

In the present case, Petitioner's trial counsel failed to meet with Petitioner in advance of his meeting with the pre-sentence investigator making his report and failed to provide any relevant documentation to the pre-sentence investigator or to the court. Additionally, Petitioner's counsel failed to interview and present potential family members, medical experts, prior probation officers, foster families, and other witnesses who could have provided the court with information regarding the Petitioner's background, state of mind, and other mitigation. See Affidavits, Exhibit B - J.

In Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), the District Court held that counsel was ineffective because he failed to investigate and to present a psychiatric mitigating defense based on his client's mental deficiencies, abject childhood and history of drug and alcohol abuse. The District Court found, however, that there was no prejudice because the same sentence, even if this evidence had been presented, would have resulted. On review, the Court of Appeals for the Eleventh Circuit held that counsel must conduct a reasonable investigation or make a reasonable decision not to investigate. They relied on Strickland v. Washington, supra. In order to establish prejudice, one must demonstrate "a reasonable likelihood that an ordinarily competent attorney conducting a reasonable investigation would have found an expert similar to the one eventually produced". Id.

In the present case, the Affidavits prepared by Mr. Langlois, the Barstows, and Dr. Timothy Derning and Richard Bozich all support what a competent lawyer would have found. (Exhibits G, H, I, J).

In Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989), trial counsel failed to present at sentencing any evidence of mental problems even though he thought his client had some. He presented a defense that his client had psychiatric problems, but he did nothing to bolster that defense. See also, Evans v. Lewis, supra, (defendant hospitalized for mental problems in the past). The court held that it was ineffective for counsel to fail to investigate and present mitigating evidence when he was aware or at least thought his client may have mental problems.

The court in Deutscher, supra, stated:

> Although we do not presume prejudice in a case such as this, we must be especially cautious in protecting a defendant's right to effective counsel at a capital sentencing hearing. The constitution prohibits imposition of a death penalty without adequate consideration of facts which might evoke mercy.

See, California v. Brown, 497 U.S. 538, 554, 107 S.Ct. 837, 846 (1987).

In the present case, the record, when reviewed, puts one on notice of a long history of mental and emotional problems. The records from Y.O.U. and Vision Quest (Exhibit N), indicate most strikingly a series of prior mental health evaluations.

"Consideration of such evidence is a constitutionally indispensable part of the process of inflicting the punishment of death." Id. (Quoting Woodson v. North Carolina, 428 U.S. 286, 304, 96 S.Ct. 2978, 2991 (1976) (plurality).

In the present case, if defense counsel had provided all of the relevant information to his mental health expert, an opinion as espoused by Dr. Timothy Derning, See Exhibit I, would have been available. Any mental health expert is limited by the lack of information, lack of time to interview the client and by a lack of education about the client, his background and his family.

A review of the Petitioner's juvenile records would automatically put one on notice of mental problems. During closing argument and at the mitigation hearing, the Petitioner's attorney alluded or flirted with these problems; however, he failed to adequately investigate and present them to the court so that they could be considered substantial enough to outweigh the aggravating factors presented by the State.

3. Ineffective Assistance of counsel on appeal

The law is clear that a defendant has a constitutional right to the effective assistance of counsel on his direct appeal in state court. Evitts v. Lucey, 469 U.S. 387, 396 (1985). The inquiry that the court must make regarding whether counsel was effective on the direct appeal is similar to the inquiry that must be made when reviewing whether counsel was effective at the time of trial: (1) the court must consider the appellate counsel's performance and whether it fell below an objective standard of reasonableness; and (2) it must review whether there is a reasonable probability that the outcome of the proceedings would have different had effective assistance been provided on appeal. Strickland v. Washington, supra, 466 U.S. at 688, 694 (1984).

To be effective, appellate counsel must raise meritorious claims and brief the issues in a clear and convincing manner. It is the primary function of appellate counsel to review the trial record and bring legal errors to the attention of the tribunal. Counsel is not required to raise all potential issues; effective advocacy may include strategic decisions to omit weak claims of error when stronger claims exist. The omission of potentially meritorious issues must, however, be a matter of strategy, not a product of ignorance of fundamental constitutional law. See, Kimmelman v. Morrison, 477, U.S. 365, 385 (1986).

In the present case several of the issues set forth in this Petition for Habeas and in the post-conviction were never raised on the direct appeal. Additionally, appellate counsel failed to competently attack and argue the appropriateness of the death penalty in this case. The appeal was especially weak regarding the lack of effective assistance at trial and pre-trial and weak in the fact that both trial counsel and appellate counsel failed to investigate and develop appropriate, relevant mitigating evidence that a reasonable investigation would have brought forth.

4. Procedural ineffective assistance of counsel, or, in the alternative, the manner in which this case was handled was a reflection of incompetent counsel *per se*.

The Eleventh Circuit has examined as least one case where it found that based on the record of the trial alone, it was plain that the trial attorney did not accord the defendant even a "modicum of professional assistance at any time". Young v. Zant, 677 F.2d 792, 794-95 (11th Cir. 1982). In that case, the attorney was unaware of the fact that guilt and penalty were decided at separate proceedings and he conceded guilt.

In the present case, the manner in which the trial and appellate counsel proceeded deprived the Petitioner of effective assistance of counsel just as in Young. Id.

The record reflects a total lack of investigation and interviews of potential witnesses prior to not only a Rule 11 hearing (which was withdrawn), but also prior to trial and prior to sentencing. Motions that should have been filed were not filed, were not researched, developed nor presented to the trial court. There was a blatant failure to provide the proper materials to the psychiatric experts so that they could make a proper determination of not only the Petitioner's competence to proceed to trial, but to evaluate his sanity or his capability of forming the intent necessary to be held responsible for this crime. See Dr. Timothy J. Derning's Affidavit attached as Exhibit I. Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987).

In Elledge, the sole issue at sentencing was the defendant's mental deficiency. The District Court held that trial counsel was ineffective because he failed to investigate and to present a psychiatric mitigating defense based on his client's mental deficiency, abject childhood and history of drug and alcohol abuse.

In that case, the reviewing court found that that was ineffective, but there was no prejudice because there was no proof that the psychiatrist who testified on post-conviction would have been available or anyone else would have been available at the time of the trial. In our case, the experts that were available were never provided with adequate information, nor the time to spend with the Petitioner in order to make determinations that were necessary in order to inform the court and the jury of potential mental impairment as mitigation at the penalty phase. Dr. Derning, in his Affidavit, Exhibit I, indicates that with a proper review of all of the materials that were now provided, which were available at the time of trial, and with adequate time, ten hours, to visit with the Petitioner, a thorough, clinical evaluation as is necessary in this type of case, can be done and the conclusions would have been drastically different than the ones formed by the mental health experts that were utilized in 1984.

Under Strickland counsel must conduct a reasonable investigation or make a reasonable decision not to investigate. In the present case, there clearly were reasons to investigate and to present mitigating evidence on behalf of the Petitioner.

In Agan v. Dugger, 835 F.2d 1337 (11th Cir. 1987), the court found that when a record reflects that an attorney did not spend "much time" on a capital case, i.e., no legal research, no interviews, no development of defenses, no competency hearing (when there has been a history of mental problems), that an evidentiary hearing is necessary and if there was not one provided at the state level it should be done at in Federal District Court because there is enough on the record to establish ineffective assistance.

Therefore there was ineffective assistance per se in this case. Even the Arizona Supreme Court held that this was a very borderline- finding effective assistance only because there was a co-defendant who the Court held was effective; however, the co-defendant's counsel was not concerned with zealously representing the Petitioner, in fact he was shifting the responsibility to the Petitioner.

B. Pre-Trial Issues

1. The state court committed constitutional error when it excused for cause a prospective juror with scruples against capital punishment.

During the selection of the jury the prosecutor successfully challenged for cause venirewoman Eloise Atwater, who in responding to voir dire questions expressed conscientious scruples against capital punishment. Ms. Atwater's exclusion from the jury panel over Petitioner's objection violated his constitutional right to an impartial jury selected from a pool of prospective jurors each of whom is qualified despite their hesitations concerning the death penalty. Witherspoon v. Illinois, 391 U.S. 510 (1968); Adams v. Texas, 448 U.S. 38 (1980). By excluding a juror who is Witherspoon-Adams qualified, the State violated Petitioner's rights to due process. The violation occurred when the State breached its constitutional obligation to refrain from seeking Ms. Atwater's excusal for cause simply because of her opposition to capital punishment, absent proof that her views on capital punishment would have "prevented or substantially impaired" the performance of her duties as a trier of fact. Adams v. Texas, 448 U.S. at 45.

The constitutional rights at issue are founded on the sixth and fourteenth amendments. In a line of cases beginning with Witherspoon v. Illinois, 391 U.S. 510 (1968), the United States Supreme Court has held that in a capital case a prospective juror cannot be culled from the jury panel based simply upon that individual's expressed personal aversion to execution as a form of punishment. Nor under this line of authority is it sufficient, as the record with respect to Ms. Atwater admittedly establishes, that the prospective juror's deliberations on issues of fact would be "affected" by the imposition of a death sentence upon conviction. Adams v. Texas, supra. Rather, in order to withstand constitutional challenge a prospective juror's excusal for cause based upon her aversion to the death penalty must be predicated upon a showing that the excluded venirewoman's belief rendered her incapable of honestly affirming to follow the law or to obey her duty to be impartial. Id. With regard to Ms. Atwater, the State's successful motion for excusal is not fairly supported by the whole record.

Ms. Atwater was called as a prospective juror on the last day of a four-day jury selection process. T. 2/3/84, pp. 522-558, 571-581. She was 1 of 10 individuals called to the jury box to the questioned, first as a group by the trial court and then individually by the attorneys. When she and the other veniremen were asked by the court to speak up if they felt that they were incapable of following the law as given to them by the court, she and others made no response. T. Id. p. 537. Significantly, this "silent" affirmation of the juror's oath was later reaffirmed by her in response to a series of questions asked by Petitioner's counsel:

> Mr. Burke: . . . I'd like to talk to you a bit about why you're here and why we're asking these questions.
>
> You understand that you have a civic duty to appear in these proceedings?
>
> Ms. Atwater: Right.
>
> Mr. Burke: And you, I gather, take that very seriously?
>
> Ms. Atwater: Right.
>
> Mr. Burke: You believe that you have a duty to serve as a juror?
> Ms. Atwater: Yes.
>
> Mr. Burke: And the Judge has already advised you, as I think the prosecutor advised you, that your function is not to deal with the question of punishment?
>
> Ms. Atwater: Right.

> Mr. Burke: You understand that?
>
> Ms. Atwater: (no audible response)
>
> Mr. Burke: Do you believe you have a role as a citizen in determining questions of guilt or innocence of people who are accused of crimes?
>
> Ms. Atwater: I hope so.
>
> Mr. Burke: Okay. And you believe you could follow the laws that the Judge might instruct you on in deciding this case?
>
> Ms. Atwater: I would try.
>
> Mr. Burke: And you would try, would you not, to do your job as a citizen and evaluate the evidence fairly and honestly?
>
> Ms. Atwater: Yes.
>
> Mr. Burke: And make every good faith effort you could to follow the instructions of the Court?
>
> Ms. Atwater: Yes, sir.
>
> Mr. Burke: I have no more questions, Your Honor.
>
> T. _Id_. pp. 578-579.

Earlier, during a general question from the trial court as to whether there was "anything not yet discussed that _might_ influence you," that Ms. Atwater first expressed her aversion to capital punishment. T. _Id_. p. 572 (emphasis added). Her response prompted the following brief exchange with the prosecutor:

> Mr. Alfred: Do you think that this belief opposing capital punishment that you have, this feeling _would perhaps maybe_ influence you a little bit as a juror?
>
> Ms. Atwater: It could.
>
> Mr. Alfred: What I'm saying is even--maybe even if you felt that the evidence showed that the defendants were guilty of first-degree murder, would you be _maybe somewhat hesitant_ to vote guilty because you knew that

> there was a possibility of the death penalty?
>
> Ms. Atwater: Yes.
>
> Mr. Alfred: Ok. Thank you. That's all the questions I have.

T. *Id.* pp. 577-578 (emphasis supplied).

As the above quote establishes, it is at this point that the prosecutor ended his inquiry, and it is on the basis of the above answers that the prosecutor's for-cause motion was granted, over Petitioner's objection. T. *Id.* pp. 580-81.[17]

Petitioner maintains that on the entirety of this record venirewoman Atwater was stricken for cause simply because of her beliefs. She testified that as a juror she "would try" to evaluate the evidence "fairly and honestly" and "make every good faith effort" to follow the instructions of the court. Importantly, Ms. Atwater at no time stated that her scruples would substantially hinder her deliberations in applying the law to the facts. At best, the evidence in support of the trial court's finding is that her deliberations on the facts would perhaps maybe be influenced "a *little* bit" in that she would be "*somewhat* hesitant" to vote guilty because the death penalty *might* thereafter be imposed. This evidence in its totality supports no more than a finding that the possibility of Petitioner's execution would "affect" Atwater's considerations, though without sufficiently adverse impact on her ability to follow the law so as to disqualify her. Indeed, Ms.

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[17] The questions propounded by the prosecutor to Ms. Atwater were vague and tentative, and in marked contrast to the type of question the prosecutor had earlier indicated was appropriate. *See* T. 1/30/84, pp. 8-10.

Atwater by her testimony has demonstrated that she belongs to a "distinctive" group protected from excusal without cause by the fair-cross-section requirement of the Sixth Amendment: She is among those Witherspoon-Adams eligible members of the community who are willing to serve as jurors out of a sense of civic responsibility. See, Lockhart v. McCree, 476 U.S. 162, 174-75 (1986). In such circumstances the State's successful for-cause challenge unconstitutionally and unfairly restricts the cross section of the community (reflected the final jury panel in which each parties' preemptory strikes are made[14]) from which the Petitioner's petit jury was selected.

It is on virtually identical voir dire testimony of prospective jurors that the United States Supreme Court has previously found constitutional violations which merit reversal. In Adams v. Texas the Court found violations of the Sixth and Fourteenth Amendments when jurors were excluded for no more reason than that they were unable or unwilling to avow that a mandatory penalty of death or life imprisonment would not affect their deliberations on any issue of fact. Similarly, in Maxwell v. Bishop, 398 U.S. 262 (1980), the Court found constitutional violations requiring a remedy when a juror was successfully challenged for cause solely on the basis of the following exchange:

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[14] In this case, following Arizona practice, from a final panel of 34 prospective jurors, the State was granted 10 jury strikes and the Defendants five strikes each, in order to obtain a 12-person petit jury, with two alternates. T. 1/31/84, p. 2; 2/3/84, pp. 700-701. See also Rule 18.5, Arizona Rules of Criminal Procedure.

> "Q. If you were convinced beyond a reasonable doubt at the end of this trial that the defendant was guilty and that his actions had been so shocking that they would merit the death penalty do you have any conscientious scruples about capital punishment that might present you from returning such a verdict?
>
> "A. I think I do." (Emphasis supplied.)
>
> 398 U.S. at 264.

Just as the state of the records in Adams and Maxwell were insufficient to sustain a for-cause challenge, so too is the record here.

The remedy for these constitutional violations is a new trial. The issue here is controlled by Gray v. Mississippi, 481 U.S. 648 (1987), which rejects the harmless error analysis for the improper exclusion of a juror under Witherspoon and its progeny. The per-se reversal rule adopted in Gray applies because the exclusion of Ms. Atwater from the jury panel on the sole basis that she has scruples against the death penalty was a breach of the Witherspoon-Adams limitation on the State's authority to use for-cause challenges.

The argument made here is distinguishable from the holding in Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988), wherein the Court rejected the contention that under Arizona's jury trial scheme in a capital murder case the removal for cause of a prospective juror with scruples against the death penalty did not violate the Petitioner's impartial jury rights. Here the Petitioner contends that the for-cause challenge unconstitutionally infringed upon his right to have reassurance and confidence in the fairness of the criminal judicial system which tries him for a capital offense.

This assurance is founded, in part, upon a constitutional right to select from a venire composed of a fair cross section of the community, including those with scruples against capital punishment.

Since these due process rights were violated, Petitioner is entitled to a new trial.

2. Petitioner was Denied a Fair Trial Due to Extensive and Prejudicial Pretrial Publicity

Prior to trial, both before and after jury selection, Petitioner requested that the trial court change the venue of his trial to a county other than Pima County. This request was made as a result of the extensive and prejudicial pretrial publicity this case had received since it was first charged. The Petitioner's requests for a venue change were denied, and as a result Petitioner's rights to due process and a fair trial were violated when he was convicted by a jury selected from among the citizens exposed to this pretrial publicity.

The publicity consisted of frequent front-page newspaper headlines and articles, which appeared on almost a daily basis in the weeks following Petitioner's arrest and around the time of trial, as well as T.V. and radio features. See, Exhibit P for 1/31/84, 2/1/84, 2/2/84 and 2/3/84. The publicity was highly unfavorable to Petitioner and his co-defendant. It revealed his past criminal history, described the crime in detail, and presented a sympathetic portrait of the victims.

Controversies over the response time of the Marana Marshall's Office and the co-defendant's release from jail the day before the crime also kept the story in the public eye. Related stories reported the formation of citizens' anti-crime/court-watch groups and the dedication of a memorial park to one of the victims. Even worse, the publicity revealed extrajudicial facts prejudicial to Petitioner's and the co-defendant's defense. For example, on January 9, 1982, a headline in the *Arizona Daily Star* reported "Suspect Walter LaGrand Freed One Day Before Killing, "Exhibit P, and on January 28, 1982, readers of the *Tucson Citizen* learned that "Karl LaGrand Petitioner's co-defendant Admitted Role in Killing." Exhibit P. The facts that Petitioner and Karl were being tried for and convicted of robbery in a related case, that both had prior criminal records, and that each had bond set at $1 million were also revealed. *E.g.*, Exhibit P.

Indeed, on the very day jury selection began copies of the *Arizona Daily Star* containing an article on the case were being read by prospective jurors in the jury assembly room. The article asserted that Karl's lawyer believed his own client was guilty and expected him to be convicted of murder. Exhibit P; T., 2/1/84, at pp. 175-191.

Out of an original panel of 34, *29* prospective jurors (over 85%) indicated that they had some prior knowledge of the crime. T. 1/31/84, at p. 44. Despite the excusal of 14 prospective jurors for cause due to pretrial publicity and the exhaustion of Defendants' peremptory challenges, no fewer than *seven* petit jurors were empaneled who had read the articles or had otherwise gained extrajudicial knowledge of the facts. T., 2/1/84, at pp. 124-137, 193, 220; 2/2/84, at pp. 473-496, 503-507; 2/3/84, at pp. 560-571. Petitioner's motions for a change of venue and for a continuance because of prejudicial pretrial publicity were denied. The above circumstances combined to deprive Petitioner of his right to a fair trial by an impartial jury.

The sixth amendment right to a fair trial and the due process clause of the fourteenth amendment guarantee to criminal defendants in state courts the right to be tried by "a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). Extensive and unfavorable pretrial publicity may create such widespread bias in the community that, to ensure such an impartial jury, a change of venue is constitutionally required. Id.; Rideau v. Louisiana, 373 U.S. 723 (1963). While jurors need not be totally ignorant of the case, neither is a juror's assurance that he or she can act impartially dispositive of the question. The ultimate issue is the fairness of the proceeding. Murphy v. Florida, 421 U.S. 794, 799-800 (1975).

The United States Supreme Court recently reaffirmed these fundamental principles. In Gentile v. State Bar of Nevada, 111 S.Ct. 2720, the Court, upholding a Nevada Supreme Court rule restricting lawyers' extrajudicial comments to the press, stated that the nation's criminal justice system is founded on the theory that the outcome of a criminal trial is to be decided by impartial jurors who know as little as possible of the case, and that, therefore, an outcome tainted by extrajudicial statements discussing evidence that might never be admitted at trial would violate the defendant's right to a fair trial.

To obtain a change of venue because of unfavorable pre-trial publicity, a defendant need not always demonstrate that such publicity had an adverse effect on the jury. If the publicity is pervasive enough, a defendant will be entitled to a change of venue without an examination of the effect of the publicity upon the jury members, actual prejudice being presumed. *See*, *e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, *supra*. Thus, a change of venue may be constitutionally required if the pretrial publicity creates *actual* prejudice, or if it creates a pervasive community prejudice, so that actual prejudice should be *presumed*. *E.g.*, *U.S. v. Alvarez*, 755 F.2d 830 (11th Cir. 1985), *cert. denied*, 414 U.S. 905; *U.S. v. Rewald*, 889 F.2d 836 (9th Cir. 1989), opinion amended, 902 F.2d 18, *cert. denied*, 111 S.Ct. 64. In Petitioner's case, the venue of the trial should have been changed, both because the nature, extent, and timing of the publicity required a presumptive finding of prejudice, and because jury selection procedures demonstrated that actual prejudice had invaded the jury box.

(a) *Presumed Prejudice*

A presumptive finding of prejudice requiring a change of venue rests on an examination of the nature, extent, and timing of the publicity: the more inflammatory the publicity, the wider and more pervasive its dissemination, and the closer in time it occurs to trial, the more likely that a finding of presumptive prejudice will be constitutionally required. *See*, *generally*, *Annotation*, 33

A.L.R. 3d 17, 45-58. See also U.S. v. Maldonado-Rivera, 922 F.2d 934 (2d Cir. 1990), cert. denied, 111 S.Ct. 2811; U.S. v. Lehder-Rivas, 955 F.2d 1510 (11th Cir. 1992). In Petitioner's case, all three factors argued in favor of a change of venue. The publicity was pervasive and highly unfavorable to Petitioner. Front-page coverage continued up to and through the trial. Equally important, articles, radio and T.V. features appeared containing prejudicial extrajudicial facts.

The drum beat of publicity began on the afternoon of the killing with a front-page banner headline in the Tucson Citizen --"Banker Slain in Robbery." The article, though primarily factual, discussed the murder weapon, gave information about the victims, and provided a description of the suspects. More important, the article, like many others to follow, linked the two suspects, implying that both had participated in the killing. This article, like others, made the allegation that the killing had occurred because the robbers became angry when the victim was unable to open the safe. This accusation directly contradicted important evidence favorable to both Defendants showing that Karl had acted alone while Walter was out of the room and that Karl had reacted spontaneously and in a panic when the victim kicked him. Exhibit R.

Petitioner was identified the next day in a front-page banner headline in the Arizona Daily Star, which said, "Brothers Held in Stabbing Death of Manager in Marana Bank Office." Exhibit P. Again, Petitioner and Walter were linked and the message was that they acted together in killing the victim. Again, details of the crime were discussed, including the assertion that Dawn Lopez, a surviving victim, had been stabbed ten to fourteen times, that the victims' hands had been bound with electrical tape, and that Lopez had been ordered to take off her clothes. The accusation that the killing occurred because of Defendants' anger at the bank manager's failure to open the vault was repeated. This article is also significant because it initiated reports on one of the two controversies that generated a great deal of public interest in this case. It reported that a bank employee had called the Marana Town Marshall's Office while the crime was still in progress, but was told that the Marshall was too busy to investigate. From this point on, articles appeared concerning not only the crime itself, but the alleged failure of the Marshall's Office to timely respond, thereby keeping public interest in the matter high. Id.; see also, e.g., Exhibit P. In both of these first two articles, biographical details were given about the decease victim. Readers were told that Mr. Hartsock had served in the Air Force as an officer, had worked in military intelligence, and had lived in Tucson for almost thirty years. They also learned that he was survived by a wife and two children. Exhibit P. These and other details were repeated in subsequent stories, most prominently in a story about the town of Marana's decision to dedicate a public park in Mr. Hartsock's honor. Exhibit P. Many sympathetic articles also appeared about the wounded victim, Dawn Lopez. Exhibit P.

On the afternoon of January 8, 1982, an article appeared in the Tucson Citizen under the headline, "Brothers Held in Banker Killing: They Faced Previous Charges." Exhibit P. Thus, for the first time, readers learned that Petitioner and his Co-defendant had, at the time of the incident, been "awaiting charges on armed robbery and kidnapping in two October, 1981, supermarket holdups." Readers were also told that Petitioner had been released from jail the day before the killing, despite alleged objections from the County Attorney's Office. Id. This began the second controversy that piqued public interest in the case -- who was "responsible" for Petitioner's release? Thereafter, articles appeared containing accusations flying back and forth between various public officials on this question. E.g., Exhibit P. Indeed, several "citizens' watchdog" groups were founded in the wake of these accusations, and this too was covered E.g., Exhibit P. One article even covered the large number of petitions and complaints received by state legislators about this case and about release programs. Exhibit P. Potential jurors were, therefore, continually reminded of this highly prejudicial extrajudicial fact about Petitioner.

Additional facts concerning Walter LaGrand's past criminal record were revealed in the Arizona Daily Star headline article on January 9, 1992. Exhibit P. This article, headlined "Suspect Freed One Day Before Killing," reported that Petitioner "had spent fourteen months in state prison for robbing two convenience stores in 1980," and that Petitioner and Walter were being held on $1 million dollar bond each. The article contained a detailed discussion about Petitioner's release, including the fact that a

Superior Court judge had refused two prior motions to release him. This article also hinted at the high level of emotion that attended proceedings in this case. It reported that Commissioner Bret Harte, at Petitioner's arraignment, "warned that any spectator who talked would be ejected." Id. Articles over the next several days gave additional details of Petitioner's and Co-defendant's past criminal histories, and these details were reported in subsequent articles.

From January 8, 1982, until January 30, 1982, articles appeared on a daily basis in both the Citizen and the Star; thereafter, for the next several months, articles appeared about 1-2 times a week in both papers. Most of these appeared on the first or second page of the paper or on the first page of the "Metro" section. Some of these were factual, but others were very emotional. For example, on January 9, 1982, an article appeared on the front page of the Metro/State section of the Star, headlined "Slain Banker's Marana Friends Sad and Angry." Exhibit P. The article went on to quote many of these friends. Readers were told that Mr. Hartsock was a "good man," "like a father" to one young friend, "the best manager they ever had" at the branch, "well-liked by everybody," etc. Id. The second part of the article focused more on the interviewees' anger. Many were upset because Petitioner and Co-defendant had been "let out in the first place." One succinctly summed up the mood in the county by saying, "If they (Tucson officials) want to send those two out here, we'll have a trial, conviction and execution all today--save the taxpayers a lot of money." Id.

One memorable series of articles (mentioned, in fact, by several prospective jurors during voir dire two years later) were those discussing or providing transcripts of Dawn Lopez' 9-1-1 call immediately after the incident. Wounded and hysterical, Lopez talked for almost fifteen minutes about her pain and her fear of dying in what the Tucson Citizen, in a front-page article on January 21, 1982, called "an emotional phone call with sheriff's deputies." Exhibit P. The taped conversation, portions of which were also aired on radio and T.V., created, as might be expected, great sympathy for the victims and great rage at Defendants. It was, however, but one element in a turbulent emotional climate that made a fair trial in Pima County an impossibility for Walter and Karl.

Even those articles that were factual gave detailed reports on the progress of the police investigation, including summaries of the evidence against Petitioner.[19] The Tucson Citizen's second-page article of January 8, 1982, for example, contained a supposed "chronology of the crime," which contained erroneous assertions that one of the victims had been "slapped around" during the crime and that Hartsock may have been shot. Exhibit P. In some cases, articles about the case were coupled with related articles, such as the one appearing in the Star on January 13, 1982, in which a state representative called for an end to parole programs, citing Petitioner's case. In the course of this article, the state official referred to the crime as "heinous" and said Arizona citizens were "tired and disgusted with a government which offers them no protection." Exhibit P. Another article in the same paper the next day reported on the head of the Arizona House Judiciary Committee's attempts to "plug the loophole that freed" Petitioner. Exhibit P. The day after that, in the same paper, the Attorney General of Arizona called work furlough programs "out of hand." Exhibit P.

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[19] As one prospective juror later pointed out on voir dire, however, she never "read or heard anything that tells me they're not [guilty]." Indeed, very few of the articles even mentioned evidence favorable to the defense case, much less discussed it in any detail. T. 2/1/84, at 235 (Buchanan).

This general atmosphere of animus was augmented even by small articles that appeared on January 22, 1982, reporting that Walter and Karl had been "acting like bigshots" at the jail and that, as a result, Walter LaGrand had been struck by another inmate. Exhibit P. The public mood grew so hostile that both newspapers felt compelled to publish opinion pieces in which they called for calm. The Star published an editorial on January 22, 1892, which referred to "the public cry for revenge and reform brought on by a vicious attack on two Marana bank employees." It called the desire for vengeance "an understandable human reaction," but urged readers to direct their feelings toward "an honest and cool examination of the circumstances that ended in tragedy." Exhibit P. The Citizen, on January 13, 1982, published an opinion piece by columnist Jeff Smith, entitled, "Let Us Pause for a Moment of Rationality Amid Hysteria." This article accurately summarized the mood of the public at the time, a mood that had not dissipated even by the time of trial. As Smith said, "It appears the consensus would have the LaGrand brothers . . . swinging from the nearest tree." Even this article, despite its title, was hardly favorable to the defense; rather, it urged that the public "run Karl and Walter LaGrand through the mill and see whether it grinds them to dust or spits them back out again." Exhibit P. That both major newspapers felt compelled to publish such pleas for calm is clear evidence of the general community prejudice that surrounded this trial.

The controversy over the law enforcement response to the crime culminated in a January 24, 1982, series of articles appearing in the Metro/State section, collectively entitled, "Is Marana Protected?" One of the articles reported on citizen attempts to form a watch group in Marana. Exhibit P.

The number of prejudicial extrajudicial facts revealed in newspaper coverage both around the time of the crime and around the time of the trial was extraordinary. Besides Walter LaGrand's prior criminal record, the amount of his bond, and the circumstances surrounding his release, potential jurors were also told a great deal about the physical evidence in this case, much of it wrong or misleading. E.g., Exhibit P. Karl LaGrand's confession was the subject of many other articles, including articles covering charges and countercharges concerning the voluntariness of the confession and the circumstances under which it was taken. E.g., Exhibit P. Finally, there was extensive reporting on Petitioner and Walter's trial, conviction, and sentencing on unrelated robbery charges prior to the trial in the murder case. Exhibit P. Two articles even reported on the prosecution's unsuccessful attempt to obtain a gag order against a defense attorney in that case. Exhibit P.

This case was closely followed by radio and television as well. Only a fraction of these features is preserved in the record, see Exhibit P, but many prospective jurors referred during voir dire to the general pervasiveness of electronic media coverage. See, e.g., T. 2/1/84, at pp. 225-26 (Buchanan); 2/2/84, pp. 456-57 (Cox); 2/3/84, pp. 560-70 (Carlson); p. 621-31 (Hambrick). The crime was immediately cast as a major media event. One commentator said it was a "long time since Marana has seen anything so gruesome." Exhibit P. Initial television reports presented many of the same facts as the initial newspaper articles, including details of the crime (correct and incorrect), defendants' prior records and pending charges, Petitioner's beating by fellow inmates, and, most prominently, the controversy over Petitioner's pretrial release. Representatives of the police and prosecutor's office held press conferences and decried the release, calling it "reprehensible" and "a glaring mistake of judgment."

The images conveyed by television news features were especially prejudicial to Petitioner. Photographs of the victim were broadcast repeatedly. Defendants were shown (always together) shackled and in jail garb being transported to and from court appearances. One feature showed Defendants' arrest, including images of Karl struggling and screaming hysterically, "Get away from me." Exhibit P. Defendants were linked by words as well, viewers being told repeatedly that the "pair" had killed Mr. Hartsock. Exhibit P. The commentary, though not, of course, as detailed as the print commentary, was equally one-sided. For example, viewers were told in one report that Defendants killed Hartsock because he was trying to "protect" Dawn Lopez. Id. Petitioner urges the District Court to review the television news tapes, incomplete as they are; they give a sense of the charged atmosphere that surrounded this case from start to finish.

Courts have not hesitated to presume prejudice when media coverage has reached the levels found in Petitioner's case. In Rideau v. Louisiana, supra, the media broadcast an interview of the defendant by a sheriff in which the sheriff interrogated the defendant and obtained admissions that defendant had perpetrated the crimes with which he was later charged. Three jurors had heard the interview. The Court reversed Rideau's conviction and death sentence even though the trial had been conducted two months after the broadcast and even though there was no showing of any nexus between the broadcast and the trial. The Court held that due process required a trial before a jury selected from a community that had not seen and heard Rideau's televised interview. Id., at 726-727.

Similarly, in Estes v. Texas, supra, the Court reversed the conviction of a well-known financier because of the presumed prejudice resulting from the filming and broadcasting of his trial and other courtroom procedures. The Court noted that an actual showing of prejudice is not a prerequisite to reversal in every case.

The Court granted habeas relief to the petitioner in Sheppard v. Maxwell, supra, where, both before and during trial the petitioner had been the subject of extensive newspaper, radio, and T.V. publicity, including many matters unfavorable to the petitioner which were never admitted in evidence. The Court granted relief, not because actual prejudice was certain, but because there was a mere "probability of unfairness." Id., at 620, quoting In Re Murchison, 349 U.S. 133, 136 (1955). A change of venue or other steps to abate the possibility of prejudice (such as a continuance) were required, the Court held, "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial. . . ." Sheppard, at 620.

In the more recent case of Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985), rehearing denied, 782 F.2d 896, cert. denied, 476 U.S. 1194, presumed prejudice was found where the publicity consisted of numerous factual and opinion articles, as well as broadcast and word-of-mouth communications, up to and through trial. The evidence showed that the community as a whole was predisposed as to both guilt and sentence. The publicity covered the facts of the crime, defendants' backgrounds, the impact of the crime on the victim, and the unfavorable opinions of law enforcement personnel and local politicians. In these circumstances, as in the above-cited cases, there was no necessity for the defendant to establish a "nexus" between the publicity and the trial. Importantly, in Coleman, a voir dire in which all empaneled jurors stated that they could act impartially did not remove the taint of presumed prejudice. The court held that, even were it possible to rebut the presumption of prejudice under Rideau, a voir dire that took place in the presence of other jurors and consisted mostly of leading questions was insufficient.

Finally, in United States v. Ebens, 654 F.Supp. 144 (E.D. Mich. 1987), extensive pretrial publicity, including a public outcry concerning the failure of punishment, a prejudicial magazine article on the victim's mother, and the city's declaration of a day of mourning in honor of the victim, presumptively precluded a fair trial. In that case, the District Court concluded that the presumption of prejudice was so strong that it could not be cured by even the most careful voir dire and that it would be "extremely wasteful to attempt to do so," recognizing that even probing jury questioning cannot remove the corruption of the venire that occurs when pretrial publicity is widespread. Id. 654 F.Supp. at 146.

In Petitioner's case, that prospective jurors who had knowledge of the case professed, in response to leading questions, they could be "fair," does little, if anything, to rebut the presumption of prejudice. Knowledge of the crime, sympathy for the victims, and animosity toward Walter and Karl had reached such proportions by the time of trial that a fair trial by an impartial jury in Pima County was certainly highly improbable, if not impossible.

(b) Actual Prejudice

Even where pretrial publicity does not rise to the level of presumptive prejudice, a change of venue is constitutionally required upon a showing of actual prejudice. The key question is whether the venire, not necessarily the actual jury selected, has been affected by adverse publicity. Swindler v. Lockhart, 693 F. Supp. (E.D. Ark. 1988), aff'd, 885 F.2d 1342. If a high percentage of potential jurors admit to disqualifying prejudice, this alone may indicate the existence of actual prejudice requiring a change of venue. U.S. v. Dischner, 960 F.2d 870 (9th Cir. 1992).

The first indication that the venire in Petitioner's case was corrupted occurred during the first day of jury selection. The trial judge called 34 potential jurors into the jury box. He then asked how many had heard or read about the case. Twenty-nine of the thirty-four indicated that they had such knowledge. T. 1/31/84, at p. 44. Thus, 85% of the venire had prior knowledge of the case.[20] Later on that day, three additional prospective jurors were called to replace those stricken for cause; all three had heard or read about the case, indicating that media penetration of the venire was probably closer to 90%. T. 1/31/84, at pp. 70-107.

Because of this case's exceptionally high profile, the trial judge, over the next several days, attempted to find an impartial jury through individual voir dire. His efforts were hampered (to say the least) by, among other things, the discovery that copies of the Arizona Daily Star containing an article about the case were being read by prospective jurors in the jury assembly room. This article is worthy of particular note, not only because it was read immediately before trial by some jury panel members, but because of the extremely prejudicial information it contained. The article, which appeared on page 1 of the widely-read "Metro/State" section of the Star on January 31, 1984, was headlined "Suspect in Bank-Holdup Sleying Denied New Lawyer." In the second paragraph of the article, Karl LaGrand was quoted as saying that his lawyer had "stated to me there was no defense. I was going to get found guilty of murder one." Exhibit P. The article also reported that Karl had complained that his lawyer had only conferred with him a few times and hadn't had time to prepare an adequate defense. Id. Apart from Karl's comments, the reporter noted that one lawyer had already withdrawn from Karl's defense, that several defense motions had been denied, that the co-defendants were planning mutually-antagonistic defenses, and numerous other extrajudicial facts. Of the panel members questioned, no fewer than four admitted reading the article. T. 2/1/84, at pp. 175-186 (Eddy), 191-213 (Pike), 307-325 (Tucker); 2/2/84, at pp. 421-434 (Guzman). Three were removed for cause, but the fourth, Mr. Pike, was not, even though challenged by the defense and even though he recalled that the article said one defendant (he couldn't remember which) was not happy with his lawyers and did not feel his case was being presented well. T., 2/1/84, at pp. 194-195, 204-211.

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[20] Of these, 4 indicated that they had personal knowledge in addition to what they had heard and read in the media.

The most important factor in any analysis of actual prejudice is the percentage of prospective jurors disqualified for cause due to pre-trial publicity. Murphy v. Florida, 421 U.S. at 805. In Petitioner's case, some 14 potential jurors were eventually disqualified for this reason--approximately 30% of the total panel called.[21] Nor did the actual jury escape the effects of this prejudice. Both Defendants exhausted their peremptory challenges (a total of 10). Nevertheless, of the 14 jurors and alternates empaneled, at least seven had admitted that they had prior knowledge of the case. This extraordinary showing of actual prejudice made a change of venue constitutionally required.

The first case in which the United States Supreme Court considered a showing of actual prejudice was Marshall v. U.S., 360 U.S. 310 (1959). That opinion, though based on the Court's supervisory powers over the Federal Courts, makes instructive reading. Marshall was convicted of unlawfully dispensing prescription drugs. The trial judge had refused to allow the Government to prove that the defendant had previously practiced medicine without a license. Nevertheless, during trial, two newspapers containing such information reached "a substantial number of jurors." The newspaper articles also mentioned Marshall's two previous felony convictions. Upon questioning by the trial judge, seven jurors stated they had read or seen one or both of the articles; all, however, insisted they could make a decision not influenced by the articles. The trial judge, therefore, denied defendant's motion for a mistrial.

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[21] These numbers are more than 50% greater than those found insufficient in two recent Ninth Circuit cases, U.S. v. Dischner, 960 F.2d at 892 (16.7%), and Harris v. Pulley, 885 F.2d 1354, 1363-64 (1988) (18.5%).

The Supreme Court reversed, holding that the trial judge had abused his discretion. The Court pointed out that:

> We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. (Citation omitted) It may indeed be greater for it is then not tempered by protective procedures.

Id., at 1252. Marshall, like Petitioner, had no opportunity to rebut the prejudicial information members of his jury had learned from newspaper accounts. Both were deprived of a fair trial by an impartial jury.

In Irwin v. Dowd, supra, defendant was charged with the commission of six murders. The crimes were extensively reported by the local news media, arousing "great excitement and indignation." The Court, after noting that the Constitution establishes no particular test, held that, where eight jurors had seen or heard newspaper or T.V. accounts of the crime, including Petitioner's confession and allegations of other crimes, no fair trial could be had. The Court took a realistic view of the jury's exposure to adverse publicity, stating "the influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." Id., at 727, citing Delaney v. U.S., 199 F.2d 107. The change of venue to a new county was the only means by which the pernicious influence of fixed opinions could be eliminated.

A number of cases have dealt with the prejudicial effects of jurors reading newspaper accounts during trial, most notably Marshall v. U.S., supra. Both state and federal courts have held that a juror's reading of a prejudicial newspaper account of a criminal trial during the proceedings is grounds for a new trial or reversal. Annotation, 85 A.L.R. Fed. 1, § 5; Annotation, A.L.R. 4th 11, § 7. These cases, while not directly pertinent to the instant one, are closely analogous; they recognize the extreme unfairness to an accused of being tried by a jury whose members have been exposed to prejudicial extrajudicial information near in time to their deliberations and verdict. Two of the cases cited in the annotations deserve particular note. In People v. Holloway, 50 Cal. 3rd 1098, 269 Cal. Rpt. 530, 730 P.2d 1327 (1990), the court held that the trial court had erroneously failed to order a mistrial based on juror misconduct when it discovered that one of the jurors had read a newspaper article on the second day of trial, which stated that the accused was on parole from prison after having served time for assault, and which otherwise revealed prejudicial information about the accused not admissible in court. Significantly, the juror's conduct was considered prejudicial, notwithstanding his failure to disclose any of the offending information to the other jurors. A similar result obtained in a Ninth Circuit case, United States v. Smith, 790 F.2d 789 (1986).

But the showing of actual prejudice in Petitioner's case is not based on any single event. The extensive prejudicial media coverage, outlined earlier, combined with the clear evidence that this coverage had reached the prospective jurors, mandated a change of venue. Despite a careful and searching inquiry, including individual voir dire, Petitioner was tried by a jury, half the members of which had prior knowledge of the case. Petitioner exhausted his peremptory challenges removing jurors who had admitted detailed knowledge of the case, including, for example, the victim's 9-1-1 call transcript. *See*, *e.g.*, T. 2/1/84, at pp. 124-135 (Rosengard); 2/2/84, at pp. 475-495 (Shonk); 2/3/84, at pp. 560-570 (Carlson). Numerous courts have held that defendants in similar circumstances were deprived of their constitutional right to a fair trial and have granted reversals. *See*, *e.g.*, *People v. Williams*, 259 Cal. Rptr. 473, 774 P.2d 146 (Cal. 1989) (there was a reasonable likelihood Black defendant charged with capital murder of white woman could not receive fair trial due to pretrial publicity where there was extensive pretrial publicity and jury selection process showed jurors' widespread familiarity with the crime); *State v. Robinson*, 389 N.W.2d 401 (Iowa 1986); *Fisher v. State*, 481 So. 2d 203 (Miss. 1985); *People v. Taylor*, 462 N.E.2d 478 (Ill. 1984)(in murder prosecution, court improperly refused change of venue where both venire and jury exhibited familiarity with the case, particularly with inadmissible results of co-defendant's polygraph test); *State v. Clark*, 442 So.2d 1129 (La. 1983); *People v. Botham*, 629 P.2d 589 (Colo. 1981)(first-degree murder conviction reversed where approximately 60% of the prospective jurors questioned had detailed knowledge of the crime and had expressed the opinion, at one time or another, that defendant was guilty); *Commonwealth v. Frazier*, 369 A.2d 1224 (Pa.

1979); People v. Culhane, 33 N.Y.2d 90, 350 N.Y.S.2d 381, 305 N.E.2d 469 (1973)(change of venue required in murder prosecution where extensive pretrial publicity resulted in difficulty in jury selection, causing defendant to exhaust peremptory challenges); State v. Shawan, 423 P.2d 39 (N.M. 1967)(change of venue required where seven members of jury panel had read or heard about the case); Coates v. State, 773 P.2d 1281 (Okla. Crim. 1989) (change of venue should have been granted where crime was well publicized and most potential jurors were familiar with the case; four of 25 potential jurors had opinions about the case); People v. Brensic, 136 App. Div. 2d 169, 526 N.Y.S.2d 968 (1988) (in murder prosecution, change of venue should have been granted where high percentage of prospective jurors, five of whom were seated, had knowledge of case); Nickolai v. State, 708 P.2d 1292 (Alaska App. 1985); Re Miller, 33 Cal. App. 3d 1005, 109 Cal. Rptr. 648 (1973) (murder defendant should have been granted change of venue where only three of 41 prospective jurors had not read or heard of case, and seven had formed opinions).

As in the above-cited cases, the jury selection process in Petitioner's case did not dispel, but rather confirmed, the presumption of prejudice. The difficulties that occurred during the jury selection process, combined with the other evidence of community prejudice in this case, provide an ample showing of actual prejudice, both as to the jury panel and the jurors and alternates selected. This prejudice so permeated the trial that it changed the result. A less prejudiced jury would have found

Petitioner innocent of the murder and attempted murder, or at worst would have found him guilty of the lesser-included offense.

3. The failure to notify the Petitioner of his right to inform the German consulate of his arrest, as required by international treaty, violated the Petitioner's rights under the fifth, sixth and fourteenth amendments to the United States Constitution

The Arizona authorities violated the Vienna Convention on Consular Relations, a multi-lateral international treaty, Exhibit Q, to which Germany and the United States are signatories, by failing to notify Mr. LaGrand upon arrest of his right under the Convention to inform his home consulate of his detention. The consulate, which functions to protect the interests of its nationals, would have been in a position to render Mr. LaGrand vital assistance had it been informed of his situation. In failing to honor Mr. LaGrand's internationally-recognized rights, the State of Arizona denied Mr. LaGrand due process of law. In addition, the State denied him the right under the compulsory process clause of the sixth amendment to obtain favorable witnesses. As a result of this serious violation of international law, the trial court was deprived of significant mitigating evidence which in all probability would have altered the outcome of the penalty phase for Mr. LaGrand.

(a) The Vienna Convention on Consular Relations.

Article 36 of the Vienna Convention on Consular Relations of 1963 provides that:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending state...

> (a) Consular officials shall be free to communicate with nationals of the sending state and to have access to them...
>
> (b) If he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner....The said authority shall inform the person concerned without delay of his rights under this subparagraph.
>
> (c) Consular officials shall have the right to visit a national of the sending state who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation....

Vienna Convention on Consular Relations, April 23, 1963, TIAS 6820, 21 U.S.T. 77, 596 UNTS 261 (emphasis added) See Exhibit Q. The Convention was ratified by the United States Senate of December 24, 1969; as a ratified treaty, it is the supreme law of the land. United States Constitution, article IV, clause 2; See, e.g., Foster v. Neilson, 27 U.S.(2) PET. (252, 314) (1929). The duties made mandatory by article 36 are as binding on Arizona officials as a federal statute.

(b) The significance of the rights provided by Article 36

The United States government regards the notification requirement as an obligation "of the highest order that should not be dealt with lightly". State Representation, 1973 Digest § 2 at

161 (Statement of the Department of State, October 24, 1973). State Department and consular officials immediately intervene diplomatically and strongly protest upon discovering that another nation has failed to notify a detained United States citizen of his Vienna Convention rights. State Representation, 1975 Digest § 2 at 149 (United States responds to an article 36 violation by Syria).

As the United States recognizes, notification to an arrestee of his rights under article 36 is essential to insuring that a foreigner has his government's protection and assistance as soon as he is confronted with another nation's criminal justice system.[22] Early notification and access to an arrestee is crucial:

> In order for the consular officer to perform the protective function in an efficient and timely manner, it is essential that the consul obtain prompt notification whenever a United States citizen is arrested. Prompt notification is necessary to assure early access to the arrestee. Early access in turn is essential, among other things, to receive any allegations of abuse and to provide a list of lawyers and a legal system fact sheet to prisoners.

State Representation, 1980 Digest § 2 at 360.

Immediate notification of a detainment allows the home consulate to intervene at a crucial point to gather critical information and contact those who are best able to aid the accused.

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[22] The Vienna Convention expressly states that consular functions include "helping and assisting nationals" and "protecting...the interests of the sending state and its nationals." Vienna Convention on Consular Relations, article IV(b) and (e). *See also, Vienna Convention on Diplomatic Relations*, 23 U.S.T. 3230 (1961); Luke T. Lee, Consular Law and Practice 134 (1991) (protection of and assistance to nationals is a consulate's primary function).

Aid at an early stage of the proceedings is so critical that the United States demands the foreign governments act "as quickly as possible, and in any event, no later than the passage of a few days" to inform our consular officials of an arrest. 1975 Digest, State Representation, § 2 at 249.

(c) The German assistance that Mr. LaGrand would have received had his rights not been violated.

Most consulates have a mandate to protect and assist their nationals who live and travel abroad and to respond promptly when they find themselves in distress. This function is one to which the government attaches a high priority. The countries who signed the treaty, like the United States, regard the rights provided under 36 as basic to this function.

Immediately upon being contacted by undersigned counsel (in 1992), the German consulate made arrangements to travel to Florence, Arizona to visit Mr. LaGrand and to determine his origin. Mr. LaGrand's mother is a German citizen and Mr. LaGrand was born in Germany. He spent his first six years living in Germany until his mother married and her new husband, Massie LaGrand, adopted Karl LaGrand and transferred the family back to the United States. The LaGrands were transferred back to Germany when Karl was approximately eight years old for a short period of time due to Mr. Massie LaGrand's military service. Thereafter, they returned to the United States and lived in Arizona.

The consulate has now contacted the LaGrands, and are in constant communication with them at this present time. They have travelled to Florence, Arizona and personally met with Mr. LaGrand and have indicated their support for Mr. LaGrand. The German consulate has made it clear that the Republic of Germany is absolutely against capital punishment and will work to assist Mr. LaGrand in any way that they possibly can.

If the consulate had been contacted immediately upon the arrest, they would have been in contact with Mr. LaGrand back in 1984. They would have been able to obtain information concerning the specific charges and whether Mr. LaGrand was able to provide financially for his defense. They could have assisted Mr. LaGrand in obtaining effective assistance of counsel at that time. The consulate would have also acted as a conduit to the home government. The consulate could have located family and friends who could have assisted the detainee and provided significant, relevant mitigating evidence. The consulate also could have provided assistance to trial counsel and they may have attended and followed the legal proceedings.

These valuable procedures insure that a detainee's rights are protected through every stage of the foreign legal proceedings and that those proceedings meet standards required by international law. But the home state is dependent upon the detaining state and its commitment to its duties under international law to set the procedural safeguards in motion. If the detaining state does not honor its obligation to inform the arrestee of his rights, the home state may never learn of the detainment. The national is left unprotected, perhaps unable to communicate his whereabouts and his predicament to family and friends.

(d) Failure to notify Mr. LaGrand of his rights under the Convention violated his rights under the fifth, sixth and fourteenth amendments to the United States Constitution

Violation of Mr. LaGrand's rights under the Vienna Convention resulted in a capital sentencing phase in which virtually no mitigating evidence was available or presented. Hearing only government characterizations of Mr. LaGrand and without the benefit of a complete family history and background, the trial court was not in a position to make an informed decision regarding whether there were significant mitigating factors to outweigh the aggravating factors found in this case. The death sentence resulted directly from the denial of Mr. LaGrand's vital procedural rights. This serious violation of international law sets Mr. LaGrand's case apart from the vast majority of Arizona capital cases, it raises uncommonly compelling constitutional issues under the due process clauses of the fifth and fourteenth amendments and particularly under the compulsory process clause of the sixth amendment.

(e) Claims arising under the Compulsory Process Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments are measured against a "materiality" standard.

The compulsory process clause of the sixth amendment[23] secures for the criminal defendant "the right to offer the testimony of witnesses...in plain terms to the right to present a defense...the right to present his own witnesses to establish a defense." *Washington v. Texas*, 388 U.S. 14, 19 (1967). The right to compulsory process has been incorporated by the fourteenth amendment and is applicable to the states, and it "stands on no lesser footing than other sixth amendment rights..." *Washington v. Texas*, *supra*, 388 U.S. at 18. In *Washington*, the court held that "the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the state arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and *whose testimony would have been relevant and material to the defense* ." 388 U.S. at 23 (emphasis added). Resident aliens are entitled to this right and to all other rights under the fifth, sixth and fourteenth amendments. *Wong Wing v. United States*, 163 U.S. 228 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

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[23] In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance

Thus, appeals asserting violations of the compulsory process clause of the sixth amendment, unlike appeals under the adjacent assistance of counsel clause, are measure against the more liberal "materiality" standard. Compulsory process clause analysis is entirely divorced from sixth amendment considerations under the assistance of counsel clause. Instead, it often merges with

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of counsel for his defense. United States Constitution Amendment Six (emphasis added).

"fundamental fairness" analysis under the due process clause of the fifth and fourteenth amendments. See, e.g., Crane v. Kentucky, 476 U.S. 683, 690-691 (1986) (defendant's constitutional rights violated by exclusion of testimony about the physical and psychological environment in which his confession was obtained). "Whether rooted directed in the due process clause of the fourteenth amendment or in the compulsory process or confrontation clause of the sixth amendment, the constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." Id. These clauses require, at the very least, that the government take no improper action that has the effect of blocking the defendant's ability to gather exculpatory or mitigating evidence. Indeed, as the court suggested in United States v. Nixon, 488 U.S. 683 (1974), the clauses can in fact plausibly be read to affirmatively require government production of relevant evidence:

> The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The sixth amendment explicitly confers upon every defendant in a criminal trial the right 'to be confronted with the witnesses against him' and 'to have compulsory process for obtaining witnesses in his favor'. Moreover, the fifth amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

Id. at 711.

The less stringent "materiality" standard for claims brought under the compulsory process clause, as well as the close relationship between that clause and the due process clause, was reaffirmed in United States v. Valenzuela-Bernal, 458 U.S. 858 (1983), the leading case involving the compulsory process clause as applied to foreign nationals. The defendant in Valenzuela-Bernal alleged that the deportation, prior to his trial, of illegal aliens who had witnessed the alleged crime, violated the compulsory process clause and the due process clause. The court upheld the conviction in Valenzuela-Bernal because the defendant had been utterly unable to make "some plausible explanation of the assistance he would have received from the testimony," Id. at 871, and because prompt deportation of the alien witnesses in that case satisfied immigration policy and was "justified by several other practical considerations". Id. at 865. However, the court articulated the general standard unequivocally, and it is clear from the Valenzuela-Bernal case that a criminal defendant's sixth amendment right to compulsory process is violated when the government arbitrarily prevents the defendant from introducing evidence that would have been both material and favorable to the defense.[24]

The "materiality" standard also applies when the violation of international law in Mr. LaGrand's case is examined under the due process clause of the fifth and fourteenth amendments. See, Brady v. Maryland, 373 U.S. 83, 87 (1963) (prosecution's suppression of favorable evidence "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"). In Brady, the court held that the criminal defendant's due process rights were violated when the prosecution denied him access to the confession of his co-defendant, who had been tried separately. Similarly, because this violation of international law in the present case had the effect of denying Mr. LaGrand the testimony of family and friends, who would have offered non-cumulative evidence about Mr. LaGrand's childhood, family background, and mental health clearly material to punishment, the state's action rises to the level of a constitutional due process violation under the Brady standard.

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[24] Sanctions may be imposed on the government for deporting witnesses only if the criminal defendant makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses. Id. at 873.

(f) The facts of Mr. LaGrand's case and the circumstances of his death sentence meet the "materiality" standard of the due process and compulsory process clauses

For Mr. LaGrand's case, analysis under either the compulsory process clause or the due process clause compels the same result, because the standard for constitutional violation is the same. "A violation of these provisions requires some showing that the evidence lost by arbitrary government action would be both material and favorable to the defense." United State v. Valenzuela-Bernal, supra, 458 U.S. at 873. The element of arbitrariness is satisfied in Mr. LaGrand's case, where the state violated international law without any countervailing state interest such as the immigration laws and policies at work in Valenzuela-Bernal. For the "material and favorable" inquiry, the defense must only show that it is plausible that the testimony of Mr. LaGrand's family members and friend and neighbors would have the requisite material and favorable effect. With regard to the sentencing phase at least, this lower threshold is met: the facts set forth in the affidavits attached and through interviews with the family members living in Arizona indicate that there was mitigating evidence as well as evidence of Mr. LaGrand's mental health that was crucial information and which was never raised during trial or at the penalty phase. See, e.g., Lockett v. Ohio, 438 U.S. 586, 602 (1978); Woodson v. North Carolina, 428 U.S. 280, 303 (1976); Furman v. Georgia, 408 U.S. 238, 286-291 (1972). To this end, any relevant mitigating evidence is essential. Jurek v. Texas, 428 U.S. 262, 271 (1976).

(g) Prior cases decided under the due process and compulsory process clauses provide powerful precedent for finding a violation of Mr. LaGrand's constitutional rights

The Supreme Court's vigilance against the sort of government action that has deprived Mr. LaGrand of his right to compulsory process has an impressive historical pedigree. Thirty-five years ago, the court in Roviaro v. United States, 353 U.S. 53 (1957), reversed a conviction on the principle that, whenever the government must disclose a witnesses' identify to the defendant, it must also take reasonable steps to obtain the information needed in order for the defendant to find the witness. Id. at 64-65. This is in many important ways a mirror image of the LaGrand case; Roviaro's principle applied to somewhat inverse facts, should hold where international law compels the government to facilitate the discovery of the defendant's identity and whereabouts by his consulate and by other with the means to aid him, the compulsory process requirement compels the state, in essence, to make reasonable efforts to obtain and convey the information necessary in order for the witnesses to find the defendant, an arbitrary failure to do this amounts to a constitutional violation whenever the defendant's access to plausibly material and favorable evidence is effectively obstructed.

This state's failure to abide by the Vienna Convention - to notify Mr. LaGrand of his right to contact his consulate - is sufficient to demonstrate a violation of the compulsory process and due process clauses, because it has been long established that the state need act specifically or even affirmatively to prevent testimony in order to trigger a constitutional remedy. In Webb v. Texas, 409 U.S. 95 (1972), the witness was not prevented from testifying, but rather merely was discouraged by the judge's warning of the consequences of perjury. "In light of the great disparity between the posture of the presiding judge and that of witnesses in these circumstances, the unnecessarily strong terms used by the judge could well have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether to testify." Id. at 98. The judge's actions "effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the fourteenth amendment." Id. (emphasis added).

A similar -- if not a greater -- disparity in "posture" existed here between the state and the alien prisoner they had seized, Mr. LaGrand. The state's failure to honor a foreign national's rights under international law effectively prevented the discovery and introduction of crucial testimonial evidence about the defendant's history and background that quite plausibly would have a material impact on his sentence. This failure rises to the level of a constitutional violation. See, Penry v. Lynaugh, 492 U.S. 302 (1989) (Texas sentencing scheme as applied to habeas corpus petitioner held unconstitutional because the jury was unable to give effect mitigating evidence of childhood abuse and mental retardation as bearing on his personal culpability); Grandviel v. Lynaugh, 881 F.2d 185, 198 (5th Cir. 1989) ("The eighth and fourteenth amendments require that the defendant in a capital case be permitted to present for the jury's consideration during the punishment phase any mitigating evidence regarding the defendant's character, prior record, or the circumstances of the defendant's crime.")

The government's failure to compel properly with normal procedure triggers the compulsory process clause. In United States v. Theresius Filippi, 918 F.2d 244 (1st Cir. 1990) (conviction upheld on other grounds), the Court of Appeals concluded that the defendant's constitutional right to compulsory process was violated with the United States did not meet its requirement to make a witness' appearance possible by requesting special interest parole from the I.N.S. "Such a deliberate omission to act, where action was required, by the United States Attorney constitutes a violation of the sixth amendment right compulsory process and, derivatively, the right to due process protected by the fifth amendment." Id. at 247. As in Theresius Filippi, government action in Mr. LaGrand's case was mandated -- hereby an international treaty to which the United States is a signatory -- and mandated for the same ultimate purpose: to secure the defendant's access to all potentially mitigating material evidence.

The Vienna Convention violation had, in these circumstances, the effect of denying Mr. LaGrand crucial testimony relevant to the jury's answers to the special questions on sentencing. It is the effect -- what happened under the particular circumstances -- to which compulsory process analysis directs a court's focus. United States v. Tsutagawa, 500 F.2d 420 (9th Cir. 1974). The defendant's constitutional right to compulsory process includes the "right to formulate his defenses uninhibited by government conduct that, in effect prevents him from interviewing witnesses who may have been involved and from determining whether he will subpoena and call them in his defense." Id. at 423 (emphasis added). The Tsutagawa court emphasized that the government put the witnesses beyond the reach of the defendant "for all practical purposes". Id. In this case, the state's flaunting of international law had the effect of depriving Mr. LaGrand of family and friendly testimony. As in Tsutagawa, the foreclosure of key testimony "for all practical purposes" amounts to a violation of the compulsory process and due process clauses.

(h) The Vienna Convention and the due process and compulsory process clauses of the constitution strive to protect the same fundamental rights

It is precisely to avoid the sort of calamitous scenario that has been played out in this case, that the Vienna Convention specifically requires that the arresting country advise the defendant of his right to contact his consulate. A foreign national such as Mr. LaGrand has been granted rights under international law specifically so that he may notify his home government, which can then begin to use its resources to provide information imperative to the administration of justice and due process of law. This information is for all practical purposes otherwise unavailable to the court or to the defendant himself; it is information, vital to a "fundamentally fair" result, that will remain tragically beyond the court's reach unless the fact of the defendant's arrest becomes known to his consulate, and by extension to his country and family members, as well as associates. The United States Supreme Court has affirmed that:

> Cases establish, at a minimum that under the compulsory process clause criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt.

Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987).

Whether he deserved more help "in compelling the attendance of favorable witnesses," Mr. LaGrand, at the very least, deserved access to the information guaranteed to him by international law. That this simple, crucial notification was denied to him, in a prosecution in which the state sought the death penalty, is constitutionally intolerable. See, California v. Brown, 479 U.S. 538, 541-542 (1987) (O'Connor, J., concurring) ("Consideration of any relevant mitigating evidence regarding character and the circumstances of the offense is a 'constitutionally indispensable part of the process of inflicting the penalty of death'.")

The United States has signed a treaty, binding under international law, that mandates a process by which an alien defendant maintains his right to create an adequate defense by securing at least a minimal level of assistance in finding relevant information and evidence, and in securing important foreign witnesses who lie beyond subpoena power. The safety of all foreign nationals of signatory countries -- including Americans seized abroad -- is dependent upon international cooperation. In the circumstances of this case, the failure of our nation to live up to international obligations it has sworn to undertake has had devastating consequences for Mr. LaGrand -- consequences not permitted by our constitution. See, e.g., Eddings v. Oklahoma, 455 U.S. 104 (1982) (vacating a death sentence where the judge, as a matter of law, refused to consider in mitigation the defendant's turbulent family history, emotional disturbance, and youth at time of the offense); Lockett v. Ohio, 438 U.S. 586 (1978) (death sentence held unconstitutional because a limited range of mitigating circumstances under the Ohio statute precluded consideration of a factor such as the defendant's character and prior record).

(i) The violation of international law and of Mr. LaGrand's constitutional rights mandates the invalidation of his death sentence

Focusing on the sentencing phase of Mr. LaGrand's trial, clearly it is plausible that this lack mitigating evidence during the penalty phase deprived the trial judge of evidence extremely relevant and material to any consideration of a capital sentence: because Mr. LaGrand was denied his constitutional right to compulsory process, the court did not recieve first-hand knowledge from the German perspective about the fact that he was raised in Germany with a black step-father, a German woman national as his mother and placed for the first few years of his life with his maternal grandmother and then, when she became ill, in a Catholic orphanage of ill repute. Nor was the court aware that his natural father was black. The trial court was also denied information regarding the abusive childhood from the alcoholic step-father, the stigment of having a mixed parental background, troubled family history and information regarding his mother's placement in an interment camp during World War II.

Mr. LaGrand's conviction and sentencing no doubt contained many similarities with other capital cases; however, his is critically distinctive in at least this one respect -- it arises in the context of a clear violation of international law. The notification rights safeguarded by the Vienna Convention are particularly important in an international case such as this. See, United States v. Ismaili, 828 F.2d 153, 171 n.4 (3rd Cir. 1987) (stressing "that compulsory process clause values, working through the due process clause, created some kind of a guarantee to the testimony of foreign witnesses if their testimony was material even when the government was without power to procure their testimony").

In the international context, cooperation among nations is crucial. The Vienna Convention provides an important mechanism, imbued with the force of international law, for contacting relevant witnesses and for identifying and obtaining relevant evidence. Our government has pledged to honor this mechanism and to facilitate its operation -- a pledge that was, in Mr. LaGrand's case, ignored by the state. Such a violation cannot be abided; it is imperative that international law be respected, particularly when the stakes are so high. Our State Department surely would expect no less of another signatory nation if an American citizen was seized, tried, convicted and sentenced to death.

Legal issues arising from violations of the Vienna Convention are not common in United States courts under any circumstances -- but particularly not in a case like Mr. LaGrand's, where the violation threatens to exact the ultimate human cost. Still, it is clear that federal courts considering the ramifications of the Vienna Convention's violation have been prepared to measure the harm against the constitutional standard, had the defendants been able to offer any evidence at all that the Convention's violation denied them their rights. In Mami v. Zandtz, 1989 W.L. 52308 (S.D.N.Y. 1989), the petitioner's claim that "he was deprived of his rights under article 36 of the Vienna Convention" was denied because he failed to "indicate how any constitutional right was violated" or to describe "what the Jordanian diplomatic officials could have done for him." Id. Mr. LaGrand, on the other hand, presents a compelling story of a birth, his initial infancy and adolescent years in a country with strong racial prejudice against mixed marriages and placement in an orphanage in such a country. He further asserts what his home government could have done for him had it been properly and immediately notified. The state's arbitrary disregard for the Vienna Convention has worked to Mr. LaGrand's material disadvantage. In fact, it threatens to cost him his life.

In assessing the severity of a Vienna Convention violation in the context of an appeal from a deportation order, the court in United States v. Rangel-Gonzalez, 617 F.2d 529 (9th Cir. 1980), could easily have been describing Mr. LaGrand's case:

> The evidence presented by the defendant...took the form of several affidavits. Defendant's own affidavit stated that he did not know he had a right to consult with the Mexican consulate, and that he believed that he would have contacted the Mexican consulate had he known he could do so. The affidavit of the Mexican Consul General in Seattle stated that his office would visit an alien who called for help, would help him contact friends and an attorney, it might even send a consular representative to the deportation hearing....affidavits from various family members and legal and social service groups stated that had they known of the appellant's difficulties they would have been of assistance to him.
>
> We conclude that these affidavits made a prima facia showing of prejudice....the appellant showed he did not know of his right to contact the consular officials, that he would have done so had he known, and that such consultation may well have lead not merely to appointment of counsel, but also to community assistance in creating a more favorable record

> to present to the immigration judge on the question of deportation. The appellate did show some likelihood that had regulation 8 CFR § 242-2(e)(1979), a 'regulation intended to insure compliance with Vienna Convention on consular relations' had been followed his defense and the conduct of the hearing would have been materially affected.

Id. at 531.

The only significant difference between Rangel-Gonzalez and this case is, of course, that this case is a matter of life and death. "Because sentences of death are 'qualitatively different' from prison sentences, the Supreme Court has gone to extraordinary measures to insure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." Eddings v. Oklahoma, supra, 455 U.S. at 117-118 (citation omitted); See also, Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972). Because of that difference, a correspondingly different need exists for heightened reliability in the sentencing process. Ake v. Oklahoma, 470 U.S. 68, 87 (1985); Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280, 305 (1976). A state has a constitutional obligation to "tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia, 446 U.S. 420, 428 (1980). The Supreme Court has repeatedly condemned sentencing procedures that inject unreliability in the jury deliberations in capital cases. See, e.g., South Carolina v. Gathers, 490 U.S. 805 (1989); Johnson v. Mississippi, 486 U.S. 578 (1988); Caldwell v. Mississippi, 472

U.S. 320 (1985); Gardner v. Florida, 430 U.S. 349 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976).

This violation of international law by the Arizona authorities, and the resulting depravation of aid and testimony from his government have denied Mr. LaGrand rights considered fundamental in his home country and in ours. Our constitution calls out for the correction of these harms whenever they occur.

4. The Trial Judge's Denial of Petitioner's Motion for New Counsel or to Substitute Counsel, Violated his Rights Under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The Trial Court also Erred in Failing to Conduct a Meaningful Hearing on That Motion.

On December 14, 1983 which was approximately 45 days before the start of his trial, Petitioner filed a pro se motion to remove his attorney of record, David Gerson. The motion was entitled "Declaration of Conflict of Interest between Attorney and Client". On January 4, 1984, the Petitioner requested legal assistance from another attorney and that other attorney be substituted as counsel of record. See R. pp. 451-452. However, it was not until January 30, 1984, the day before the trial, that the court conducted an ersatz hearing on the Petitioner's motion. This hearing was prompted by Mr. Gerson's oral motion to withdraw as counsel for Karl LaGrand which was predicated upon the pro se motion seeking his removal. T. 1/30/84, pp. 51-52.

Mr. Gerson stated that "we've had some disagreement, I guess, as to how the case should be pursued." Mr. Gerson also stated "this also was based upon reasons which have been previously discussed with the court." T. 1/30/84, pp. 51-52. There is no indication in the record of what this meant. The court then had a discussion directly with Karl LaGrand who stressed that Mr. Gerson told him: "That I was going to get found guilty no matter what. I didn't stand a chance and there was no way I could get a plea bargain because of public pressure, and I feel there's a lack of interest on Mr. Gerson's part, and I just ask the court that I be represented with a new counsel." Id. at 52. Moments later, Karl LaGrand indicated that: "I felt there should have been a lot more done than he was doing and I sent the letter to him and a copy to the court asking that he ask the court to withdraw from the case and appoint new counsel, which I never heard nothing until today." Id at 55. The court asked Mr. LaGrand if he thought his counsel was prepared to proceed with the trial and Mr. LaGrand replied: "I don't think so." Id. at 55. The court questions the Petitioner specifically about David Gerson's performance. The Petitioner attempted to answer the question. However, his answers would have probably involved revealing attorney/client statements. The court responded:

> Don't tell me what you told him because that's not my business and I'm not entitled to know that.
>
> * * *
>
> No, I just -- I don't want to hear about your conversation.
>
> * * *
>
> Yes, please don't tell me specifically what your conversations were.

Id. at 57 and 58.

In trying to determine whether there were certain areas which Karl LaGrand had requested that Mr. Gerson pursue, the following colloquia ensued between the court and the Petitioner:

> **Court:** Is there anything about the case you think that he ought to know that he has not asked you about, whether it has anything to do with guilt or innocence or continuances or anything?
>
> **Karl LaGrand:** Yes, there are some things that we discussed. I feel I should not bring them up right now.
>
> **Court:** I don't want to know confidential things you have discussed with one another.

Id. at 58-59

It is fundamental that an accused charged with felony violations has a right to the assistance of counsel. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); State v. Hein, 138 Ariz. 360, 674 P.2d 358 (1983). Implicit in this guarantee is the right to be represented by effective counsel. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). Moreover, the trial judge has a duty to see that the trial is conducted with solicitude for the essential rights of the accused. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed.2d 680 (1942).

When the trial court received Petitioner's motion challenging the effectiveness of his counsel, it should have had a meaningful and immediate hearing on that motion. Petitioner, Karl LaGrand, was uneducated, inexperienced in the law, almost twenty years old and preparing for a trial in a little over a month in which his death would be asked for. The court did not conduct a hearing until the eve of trial, almost six weeks after the motion was filed. While the trial court did attempt to conduct an inquiry, it found itself on the horns of a dilemma. The court repeatedly cautioned the Petitioner not to reveal conversations that occurred between himself and Mr. Gerson. However, by precluding substantive testimony in that sense, the court prevented a meaningful inquiry into the issue of whether Mr. Gerson was rendering effective assistance of counsel. Although the court was correct in cautioning the defendant not to relate privileged communications, the court did have other options available to it. The court should have appointed temporary counsel to discuss the matter with the defendant and reached a decision whether privileged communications should be presented to the court in camera to aid a motion to remove Mr. Gerson. In this regard, there was no doubt that Mr. Gerson was not acting as the defendant's attorney. In United States v. Barnes, 662 F.2d 777 (D.C. Cir. 1980), the court recognized that one cannot reasonably expect an attorney to vigorously advocate his own prior representation of a client as being ineffective. Quoting from United States v. Hert, 543 F.2d 162 (D.C. Cir. 1976) the court stated:

> We have no doubt that the conflict corrupts the attorney/client relationship when counsel's duty to his client calls for a course of action which concern for himself suggests that he avoid.

662 F.2d at 782.

Additionally, in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 49 L.Ed.2d 564 (1975), the court said:

> An unwanted counsel 'represents' the defendant only though a tenuous and unacceptable legal

> fiction unless the accused has acquiesced in such representation the defense presented is not the defense guaranteed him by the constitution for in a very real sense it is not his defense.

95 S.Ct. at 2534.

It is clear therefore, that Karl LaGrand was without counsel at the time the court undertook to decide to motion to withdraw filed by Mr. Gerson.

The court has certain obligations at that point. The chief obligation was to see that Mr. LaGrand had counsel at this critical stage of the proceeding in conformance with his rights under the sixth amendment. The appointment of independent counsel would have resolved the dilemma facing the court. That counsel could have fully discussed the nature of Mr. LaGrand's complaints of the ineffectiveness of his attorney and made a well reasoned decision as to whether the privilege should have been waived and those conversations made part of the motion. Instead, the court elected to have Mr. LaGrand represent himself at this critical proceeding. It is submitted that the defendant was denied assistance of counsel in violation of Gideon v. Wainwright and United States v. Cronic, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) where the court said:

> ...A trial is unfair if the accused is denied counsel at a critical stage of his trial.

104 S.Ct. at 2047. Therefore, the trial judge's denial of the Petitioner's motion was error.

The Arizona Supreme Court found that the trial court's refusal to appoint or substitute new counsel was properly denied. State v. LaGrand, 152 Ariz. at 487. The court's decision that the refusal to substitute counsel was not an abuse of discretion was based on mistakes and misperceptions about the dynamics in the case around this issue. The Supreme Court commented that:

> The trial had already been postponed numerous times and by the time of the motion nearly two years had passed...and counsel had already been changed once. No real conflict between the appellant and counsel was discernable from the record. It simply appears that appellant would have been happier with other counsel...

152 Ariz. at 483.

The Arizona Supreme Court insinuates in this excerpt from its opinion that Mr. LaGrand was simply shopping for a new lawyer because he was not happy. In point of fact, Petitioner's first counsel, Thomas Higgins, tried to withdrew because of trial conflicts on May 16, 1983.[25] Karl LaGrand had no complaints or conflicts with Thomas Higgins. Less than seven months after Mr. Gerson took over the case, Petitioner asked the court to replace Mr. Gerson. Similarly, it is not accurate to claim as the Arizona Supreme Court did, that the Petitioner waited for two years before bringing his motion for substitution of counsel only to delay the trial. Again, in point of fact, the Petitioner only visited with

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[25] Curiously, Mr. Higgins was not allowed to withdraw from the case. Mr. Gerson was appointed as "associate" counsel and there was a colloquia between Mr. Higgins and the court in which Mr. Higgins stated that he would be happy to advise Mr. Gerson with any questions that he had. The trial court, therefore, knew that Mr. Gerson was inexperienced and would need help. As Mr. Higgins affidavit states, he was never called on by David Gerson for any help after Mr. Gerson took over the case. Exhibit C.

Mr. Gerson on very few occasions and had very few telephone conversations with Mr. Gerson in the less than seven months that he was actually counsel of record. Finally, the Supreme Court indicated that it could discern no real conflict between the appellant and counsel. This of course is directly related to the fact that the trial court (properly) advised Mr. LaGrand not to disclose details of his relationship with Mr. Gerson or conversations with Mr. Gerson in open court. Unfortunately, this had the effect of blocking any ability to articulate any genuine reasons he may have had for requesting new counsel. Therefore, since the travaman of this case is the performance (or lack thereof) of Petitioner's counsel, this court should find that the Constitution of the United States required more of the trial judge and the appellate review than was done and the actions of the trial judge and their confirmation by the Arizona Supreme Court was error.

C. Trial Issues

1. The trial court erroneously denied the Petitioner's submitted instruction on intoxication

At the trial, the Petitioner's trial counsel, David Gerson, submitted the standard instruction on intoxication, but the trial judge refused to so instruct the jury.

In Arizona, a defendant is entitled to an instruction on any theory of the case which is reasonably supported by the evidence. State v. Schumway, 137 Ariz. 585, 672 P.2d 929 (1983). More importantly, A.R.S. § 13-503 defines the effect of intoxication and provides that the jury may take into consideration the fact that a defendant was intoxicated at the time of the crime in order to determine the appropriate culpable mental state.

Culpable mental states

The trial court instructed the jury on a variety of possible verdicts, including both forms of first degree murder, i.e., felony murder and premeditated murder, as well as second degree murder. Exhibit T. With respect to the charge of premeditated murder, several culpable mental states were at issue. Premeditation was defined in A.R.S. § 13-1101 and required that the showing that the defendant acted with the intention or with the knowledge that he will kill another human being. Both of these culpable mental states are defined in A.R.S. § 13-105(a)(b) respectively.

Additionally, evidence was admitted during the trial showing that approximately a day or two before the homicide, Karl LaGrand and Karen Libby (an acquaintance with whom Karl LaGrand was living at the time of the crime) took "acid". In fact, they had "tripped together on a few occasions" prior to the homicide. T. 2/9/84, pp. 1014-1015. Additionally, on the evening prior to the homicide, January 6, 1982, Karl and Walter LaGrand partied together with Ms. Libby consuming beer, whiskey and marijuana. The trial court found that there was not enough evidence to justify giving the jury the intoxication instruction. This was confirmed by the Supreme Court. State v. LaGrand, 152 Ariz. 483, 487, 733 P.2d 1066 (1987).

Since the proof of premeditated murder requires proof that a defendant acted intentionally and knowingly, both of which are defined culpable mental states, the jury should have been able to determine the appropriate culpable mental state in order to properly determine whether the defendant was guilty of first degree, premeditated murder. The trial court's refusal to give that instruction, particularly in light of the admission of the evidence concerning intoxication, and the Arizona Supreme Court's affirmation of that decision was error. This is especially so in light of the fact that the jury returned a verdict of first degree murder, **without specifying whether it found premeditation or felony murder.** Given this ambiguity, the mental state of the Petitioner and evidence thereon was crucial. To have not allowed the jury to examine the mental state with regard to intoxication was error.

2. The trial court erred in restricting the Petitioner's right to a lesser included offense instruction. The Petitioner contends that Arizona's felony murder statute unconstitutionally restricts his right to due process and a fair jury trial because it has been construed to prohibit a lesser included instruction regrading second degree murder

We acknowledge that the United States Supreme Court has ruled against this argument in a 5-4 decision, Schad v. Arizona, 115 L.Ed.2d 555 (1991). However, since it was a 5-4 decision, following Payne v. Tennessee, 501 U.S. ___, 115 L.Ed.2d 720 (1991), we are raising it in this petition to preserve the issue.

Both prior to trial and at the time the court prepared instructions for the jury, the Petitioner contended that Arizona's felony murder statute unconstitutionally restricted his right to due process and a fair jury trial.

Prior to trial, the appellant filed a motion seeking the have Arizona's felony murder statute, A.R.S. § 13 1105 (A)(2) declared unconstitutional in so far as it had been construed to absolutely prohibit a lesser included instruction regarding second degree murder. R. pp. 285-287. Raised in another context, the Petitioner objected to the court's instructions on first and second degree murder in that they precluded the jury from considering second degree murder as a lesser included offense of felony murder. On this latter subject, the Petitioner offered an instruction which permitted the jury to consider the lesser included offense of second degree murder both as to premeditated first degree murder and as to felony murder. R. p. 611. The court, over the Petitioner's objection, inserted the phrase "premeditated" in various places within the Petitioner's requested instruction on the subject and thereby materially altered its meaning. Id. The Petitioner's counsel objected to this modification of the Petitioner's requested instruction. T. 2/17/84, pp. 1272-1273. After the Petitioner was convicted of first degree murder, these issues were again raised in a motion for new trial, R. pp. 673-677; 684-692, and in a post-conviction motion to vacate the Petitioner's judgment of conviction. See supplemental record on appeal, May 6, 1985.

(a) Felony murder statute is unconstitutional

The Petitioner maintains that because of the errors described above, he was denied due process and the right to a fair trial. In the present case, the matter went to the jury on both premeditated murder and felony murder theories. The penalty for both forms of murder is set forth in A.R.S. § 13-703. There are but two choices:

the sentence of death or the sentence of life imprisonment without the possibility of parole until a defendant has served 25 calendar years. However, unlike felony murder, the law with respect to premeditated murder permits the jury to convict on a lesser included offense, provided the facts support a lesser included instruction.

A.R.S. § 13-1105 is intended to identify and punish one class of felony: individuals who commit first degree murder. While it is clearly within the prerogative and power of the state to punish the crime of murder, when the state endeavors to punish by means of the death penalty, the crime and its punishment becomes unique, both in severity and in finality. Gardner v. Florida, 430 U.S. 349 (1977). The trial court's interpretation of the two provisions of the first degree murder statute has the unconstitutional effect of permitting some members of the class of felonies to escape the death penalty through the availability of lesser included offenses. See, A.R.S. § 13-1105 (A)(2). Given this interpretation, the statute is unconstitutional. Arizona's courts permit lesser included offense instructions whenever the evidence would justify the lesser charge in a premeditation case, but not when the crime is charged as a felony murder. Compare, State v. Dalgoish, 131 Ariz. 133, 139, 639 P.2d 323, 329 (1982) with State v. Celaya, 135 Ariz. 248, 256, 66 P.2d 849, 857 (1933). Given the strictures of the eighth and fourteenth amendments as interpreted by the United State Supreme Court, the class of first degree murders are exposed to punishment in impermissibly different ways. Depending on the manner in which the State of Arizona chooses to charge a first degree murderer, the state is granted too much discretion in determining the degree to which a given felon will be exposed to the death penalty. Furman v. Georgia, 408 U.S. 238 (1972). Not only does this offend the fourteenth amendment's equal protection strictures, it also offends standards of fundamental fairness.

The inability of defendants charged with felony murder to obtain a lesser included instruction under any circumstances constitutes a violation of the fourteenth amendment to the United States Constitution. In Beck v. Alabama, 447 U.S. 625 (1980), the United States Supreme Court specifically held that the death penalty may not be constitutionally imposed after a jury verdict of guilt in a capital case where, when the facts warrant it, the jury in not permitted to consider a verdict of guilt on a lesser included offense. This is so because the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction. Beck v. Alabama, supra. Trial courts should be constitutionally prohibited from withdrawing this option from the jury when the facts warrant a lesser included instruction in a felony murder case. See also, Spaziano v. Florida, 82 L.Ed.2d 340 (1984).

(b) The trial court erred in its instructions

In addition to being convicted under an unconstitutional statute, the Petitioner was convicted as a result of trial error in the instruction of the jury regarding the subject of a lesser included instruction. Exhibit T. Prior to, during and after trial, relying on the state of the evidence, the Petitioner had insisted that if his case went to the jury under Arizona's felony murder rule, he was entitled to a lesser included instruction with respect to second degree murder. The record indicates that the trial court felt that the facts warranted a second degree murder instruction, since one was given. However, over the objections of the Petitioner, the court refused to instruct the jury of a lesser degree of homicide with respect to the felony murder instructions. Exhibit T.

Beck v. Alabama, supra, held that, on the facts of that case, when the jury was not permitted to consider a verdict of guilt regarding a lesser included offense which the evidence supported, the failure to give the jury the third option of convicting on a lesser included offense inevitably and impermissible enhanced the risk of unwarranted conviction. Subsequently, in Spaziano v. Florida, supra, the United States Supreme Court clarified and in some respects expanded its holding in Beck v. Alabama, the Spaziano decision clearly indicates that Beck v. Alabama, supra, is not a holding which was limited to the facts of that case, but that Beck was rather intended to set broad new guidelines for the submission of death penalty cases to a jury. Spaziano, supra, held generally that the risk of an unwarranted conviction which is created with the jury is deprived of the third option of convicting on a lesser included offense is a violation of a defendant's constitutional right to a fair trial.

D. Sentencing Issues

1. Trial counsel failed to develop and present the Petitioner's age, chronologically as well as his maturity and past experiences as sufficient mitigation

Age is specifically delineated in A.R.S. § 13-703 (G)(5), Exhibit U, as a mitigating factor which should be weighed by the court. Thus, the age of any defendant in a mitigation hearing should be of paramount importance to a defendant's counsel at the sentencing stage. This is also true at the guilt phase.

When the crime was committed in January, 1982, the Petitioner was barely eighteen years old. The affidavit of Dr. Derning, Exhibit I, explicates and demonstrates Karl LaGrand's stunted psychological maturity. Given trial counsel's very, very minimal efforts in developing Karl LaGrand's age as a mitigating issue, even beginning at the trial level, it is not surprising that Judge Hannah found "it really isn't much of a factor..." T. January 14, 1984. Both the trial counsel and the sentencing judge's treatment of Karl LaGrand's age was superficial and constitutionally erroneous. In State v. Gerlaugh, 144 Ariz. 499, 698 P.2d 694 (1985), the Arizona Supreme Court relied on Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). The Arizona Supreme Court stated:

> Age is entitled **great weight** as a mitigating circumstance, especially if the defendant is a minor.

144 Ariz. at 461 (emphasis added).

Also in State v. Valencia, 132 Ariz. 248, 250, 645 P.2d 239, 241 (1982) where the court stated: "Age is a substantial and relevant factor which must be given great weight." However, the

Supreme Court of Arizona has refused to find age is a mitigating circumstance in other cases. State v. Walton, 159 Ariz. 571, 589, 769 P.2d 1017 (1989) (age twenty not a mitigating factor); State v. Gerlaugh, supra (age nineteen not a mitigating factor); State v. Claiborne, 142 Ariz. 335, 348, 690 P.2d 54, 67 (1984) (age twenty not a mitigating factor); State v. Gillies (Gillies I), 135 Ariz. 500, 513, 662 P.2d 1007, 1020 (1983) (age twenty not a mitigating factor). The court did find in State v. Valencia, supra, that age sixteen was a mitigating factor. In State v. Gerlaugh, supra, defendant was nineteen and a half, the court indicated that the Petitioner was adjudged mature by the trial judge. Initially, the Arizona Supreme Court in Gerlaugh found that the fact that the crime was not a hasty or an impulsive act, but involved considerable thought and cruelty; thus, the defendant's age was not a mitigating factor. 144 Ariz. at 449.

In Arizona, with regard to age as a mitigating factor, the courts will look at the maturity, the impulsivity of the crime, and the chronological age of the defendant below nineteen. These factors should have been developed by trial counsel and presented to the court from the very beginning of the trial.

Also trial counsel had access to the previous psychological evaluations and age related evaluations of Karl LaGrand and he failed to bring those to the attention of the court. For instance, in a psychological report by Gene F. Chambers, Ph.D. in April, 1978 when Karl LaGrand was fourteen years old, he was diagnosed as "severely emotionally handicapped." See Exhibit N. None of this testimony was presented to the court directly and certainly not in an effective, persuasive presentation. The sentencing report demonstrates that the information supplied by trial counsel both through the MMPI analysis of Dr. Hertz, See Exhibit O ,and the testimony of Dr. Meshorer, T. 12/14/84, as well as Dr. Meshorer's inadequate report Exhibit A, Exhibit attached to Habeas, were clearly inadequately presented.

Since the trial court in the instant case found that age was not much of a factor, it is the same mistake made by the trial judge in Eddings, supra. In Eddings, the Supreme Court said:

> The trial judge recognized that youth must be considered a relevant mitigation factor. But youth in more than a chronological fact, it is a time and condition applied for the person may be most susceptible to influence and to psychological damage.

102 S.Ct. at 869.

The record in Eddings, was replete with the same type of information which should have been supplied to the trial court by trial counsel and which is attached to this Petition as Exhibit N, O, and which formed the basis for Dr. Derning's opinions with regard to Petitioner's mental state and his maturity.

Therefore, in light of trial counsel's failure to adequately develop and present age as a mitigating factor and the trial judge's failure to adequately consider age as a mitigating factor, Karl LaGrand should have a new hearing to determine the weight to be given to this mitigating factor.

2. The statutory mitigating factor of age is vague under the eighth and fourteenth amendments to the United States Constitution and Article II, §§ 1, 2, 4, 15 and 24 of the Arizona Constitution.

A.R.S. § 13-703(G)(5) includes the statutory mitigating factor of age. There is no guidance provided within the statute to instruct the sentencer as to how and when a defendant's age should be weighed against a finding of aggravating factors.

It is improper and violates the Petitioner's constitutional rights if the sentencer weighs aggravating and mitigating circumstances that are overly vague or otherwise invalid. Socher v. Florida, 504 U.S. ___, 122 S.Ct. 2114 (1992). See also, Stringer v. Black, 503 U.S. ____, 177 L.Ed.2d 367 (1992).

In the present case, the Petitioner at the time of the crime was eighteen years and three months. At the time of sentencing, he was only twenty years old. Even though the age was presented to the trial court at the sentencing hearing, the trial court found it was not sufficient to outweigh the aggravating factors that he had found.

Neither case law nor statutory law in Arizona provide guidance to the sentencing judge as to why and how age should be considered as a mitigating factor. This failure to properly educate the sentencer violates the Petitioner's rights under the eighth and fourteenth amendments to the United States Constitution.

3. Statutory and Non-statutory mitigating evidence was not fully considered by the trial court at sentencing and therefore the sentence of death cannot stand

The record in this case reflects that mitigating evidence was not fully considered at the trial level or by the Arizona Supreme Court. The Ninth Circuit Court of Appeals in Jeffers v. Lewis, 974 F.2d 1075 (9th Cir. 1992) held that where there is a risk that mitigating evidence was not fully considered a sentence of death cannot stand.

In Jeffers, the Ninth Circuit held that the Arizona Courts failed to consider adequately certain mitigating evidence advanced by Jeffers. Although the Arizona Supreme Court considered the evidence that Jeffers was a heroin addict and was under the influence of alcohol and heroin at the time of the murder pursuant to the statutory mitigating circumstance A.R.S. § 13-703 (G)(1), it rejected that circumstance and then the court failed to consider the evidence as a non-statutory mitigating circumstance. See, Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990) (holding that Montana courts erred by rejecting mitigating evidence of a mental impairment simply because it did not rise to a level substantial enough to satisfy the wording of Montana's statutory mitigating circumstances).

Also, the sentencing court determined that Jeffers' evidence of his emotional love-hate relationship with the victim and the evidence that she provoked, the attack also did not satisfy the statutory mitigating circumstance of "unusual and substantial duress" and the State Supreme Court affirmed. The court failed, however, to go on to consider whether the evidence was sufficient to establish a non-statutory mitigating circumstance. Further, the court failed to discuss the evidence that Jeffers continued to deny involvement in the murder when he spoke with a psychiatrist under the influence of sodium amytal. The court stated, "because there is a risk that mitigating evidence in this case was not fully considered, Jeffers' sentence of death cannot stand.

In the present case neither the trial court nor the Arizona Supreme Court were in a position to adequately consider all of the mitigating evidence -- statutory or non-statutory -- because the evidence, though readily available was not fully and completely presented at the penalty trial. The court found the following:

> As to both defendants, the court finds none of the mitigating circumstances enumerated in sub-paragraphs 1 through 4 of A.R.S. § 13-703 (G).
>
> The court has considered in mitigation as to both defendants their ages and their unhappy and disruptive childhoods and family lives, the lack of a male role model, their expressed remorse, both expressed here today and in the letters they have sent to the court, and the psychiatric and psychological evidence offered on their behalf and the other evidence which was presented at the mitigation hearing, both documentary and oral.
>
> As to each defendant the court finds there are no mitigating circumstances sufficient to call for leniency or to outweigh the aggravating factors.

(See Minute Entry dated December 12, 1983, pp. 3-4, R. p. 806).

A.R.S. § 13-703 (G) outlines five mitigating circumstances which, by statute, are relevant in determining whether to impose a sentence less than death. This statute indicates clearly that mitigating evidence is not limited to the five enumerated factors. Those factors are:

> 1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.
>
> 2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.
>
> 3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
>
> 4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.
>
> 5. The defendant's age.

As indicated above, the trial court in this particular case found that mitigating factors 1 through 4 were not present; however, with the additional information that is provided through the investigation that was entertained in order to prepare the Petition for Habeas evidence was available and should have been presented to the court and the court was at least to some extent put on notice that the additional information was there, to consider mitigating circumstance (1), (2) and (4).

There was clearly enough evidence to present a defense of impulsivity that would have countered a finding of guilt on the murder one charge; however, even if the evidence was not enough to present a full defense, there certainly was evidence that should have been considered at the time of mitigation.

Upon exposing the mental state of Karl LaGrand and his prior problems with uncontrollable conduct under extreme stress, he could not have had the capacity to appreciate what he was doing at the time that the crime occurred. As Karl explained in his confession, "I wasn't me". If the mental health experts had been provided with all of the prior reports available as well as given ample time to interview the Petitioner, they would have been able to testify regarding the fact that Karl LaGrand was out of control. Dr. Derning's affidavit, Exhibit I, establishes a character trait of Karl's that makes him act without reflection and therefore it tends to establish that Karl LaGrand acted impulsively.

Even more important, the trial judge originally ruled Karl LaGrand's confession to be involuntary. Then trial counsel stipulated that it was a violation of Miranda, but not involuntary. During trial the Petitioner's co-defendant requested that it be considered in his case-in-chief. The trial judge again ruled it unreliable.

The Petitioner then requested to submit the confession during the mitigation trial. Based on the court's prior rulings and his decision that the statutory mitigation factor of A.R.S. § 13-703(G)(1) did not exist, it is fair to assume that he did not give adequate weight to this mitigating evidence. Exhibits W and Z.

At the time of sentencing, impulsivity was generally referred to in the remarks made by trial counsel for the Petitioner, but no evidence or expert testimony was presented to support the conclusions of trial counsel. Therefore, the court could not have adequately considered this vital testimony.

The second statutory factor was also present. From the confessions, which the court heard and was aware of, the court was put on notice of the Petitioner's duress under the circumstances and the scenario in the bank on the morning of the robbery. It is clear that the Petitioner panicked because of the stressful situation and reacted based on uncontrollable urges. The Petitioner was suffering from duress even though, apparently, not enough to constitute a defense to the prosecution.

The Petitioner in this case also went out of his way to avoid causing a grave risk to anyone while the robbery was occurring. He purposely took a fake gun so that no one would get hurt. He purposely decided to rob a bank because he felt that since the money was federally insured and did not belong to the individual that he was taking it from, that they would not fight.

The Petitioner asserted immediately after his arrest that he did not intend to harm anyone when he entered the bank "I did everything I thought was necessary, that no one would get hurt, whether in the bank, myself or my brother. That was the main goal. Other than getting the money and getting away. I'm no killer. 'Cuz I knew if I brought a real gun someone could get killed, and no way was I going to take that chance."

Karl not only used a toy gun in the commission of the bank robbery, but he also tried to minimize challenges. He felt that he would use finesse and bluff his way with the toy gun rather than risk the fact that someone would get shot. He felt also that if the bank employees realized that they were in no danger that they would be much less inclined to confront or to attack him or his brother. He tried to calm people when they appeared to panic and to keep the situation in control. He tried to calm Dawn down when she was getting hysterical.

He obviously had thought about the risks that could occur in this type of crime and he went out of his way to avoid those risks and to assure that no one would get hurt. It was only because of the extreme duress and stress that he broke and his uncontrollable, impulsive acts occurred causing the death of the victim and the assault on the bank teller.

As indicated in a prior argument, the defendant's age is also a strong mitigating circumstance and should not have been taken as lightly as the court considered it in this matter. See Argument D (1).

Even if the evidence that was presented was not enough to meet the statutory mitigating circumstances, the court was put on notice of its existence and should have considered it as non-statutory relevant, material mitigating evidence under Jeffers. The trial court failed to do that and therefore the weighing process violated the Petitioner's constitutional rights.

In reviewing the trial court's actions, the Arizona Supreme Court was limited to the record that was before them. Again, there was only a brief discussion of impulsivity during trial counsel's closing statements to the jury during the guilt phase and in his statements to the trial court at the penalty phase. No evidence was ever admitted, nor any expert testimony taken or psychological reports admitted to establish these mitigating factors so that the court could adequately use them in weighing the mitigation versus the aggravating factors that were found. Dr. Derning's affidavit, Exhibit I, further opines that the Petitioner was subjected to numerous experiences of neglect, verbal abuse, emotional depravation, parental indifference and apathy and psychological abuse as he was growing up. This affidavit provides numerous examples of the dysfunctional family that Karl LaGrand was raised in and supports a finding of a mitigating factor that is significant and substantial. The affidavit page 9 sets forth examples of prior evaluations and reports pertaining to Karl LaGrand and his family that support this finding. These reports were readily available and could have been presented and should have been presented to the trial court.

The affidavit further opines that Karl LaGrand was traumatized by the abuse he experienced as a child growing up in the LaGrand household. These traumatic experiences decimated the normal course of his psychological development and resulted in serious psychological impairments and symptoms. The trial court in the present matter did not adequately consider this type of psychological impairment at the time of sentencing. The impairment was documented throughout the Petitioner's childhood and adolescence by professionals who had assessed him over the years.

Dr. Derning further opines that as a result of being a victim of violence, the Petitioner finds his own violence unacceptable and therefore it is kept from conscious awareness. When the Petitioner explodes into a violent rage, he cannot identify the antecedent conditions, nor can he predict its occurrence, nor does he exert conscious volition over his actions. At the bank when he finally broke, he was out of control and could not handle the situation. His responses were separate from his conscious experience of himself. As Karl stated "I wasn't me".

Dr. Derning further opines that what occurred at the bank after Karl became threatened and panicked was totally unexpected especially since Karl LaGrand had attempted to minimize any risk of danger to anyone. His actions were totally opposite his conscious intent.

The trial court in this matter considered just the tip of the iceberg when looking at the dysfunctional family, the abuse and the psychological impairment that is present in this case. If the court had adequately considered all of the mitigating evidence that was available and properly weighed it against the aggravating factors, the imposition of the death penalty would not have occurred in this case.

This violated the Petitioner's constitutional rights under the eighth and fourteenth amendments to the United States Constitution and Article II, §§ 1, 2, 4, 15 and 24 of the Arizona Constitution.

When all of the mitigating circumstances established by the record in this case are considered together, more than sufficient mitigation exists to outweigh the aggravating circumstances held to mandate the Petitioner's death penalty. The sentencing court failed to consider, as discussed above, the mitigating circumstances together as a whole.

In State v. Correll, 148 Ariz. 468, 715 P.2d 721 (1985), the Arizona Supreme Court stated that mitigating circumstances will be considered individually and "in combination". The finding of no mitigating factors sufficient to outweigh the aggravating factors was an abuse of the trial court's discretion in this case. See also, Mills v. Maryland, 486 U.S.367 (1988).

Similarly in Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991), a non-capital case, the Fifth Circuit held that in federal habeas court review the court may apply "cumulative error" analysis in review of state proceedings. That court went on to hold that due process in violated when errors, taken together, result in a fundamentally unfair trial.

In the present case, the failure to consider all of the mitigating evidence coupled with the other argument presented on this review require a finding of violation of due process.

4. The trial court improperly failed to find the Petitioner's mental and emotional problems, abused childhood and impulsive behavior as sufficient mitigating circumstances to outweigh the aggravating circumstances. This violated the eighth and fourteenth amendments to the United States Constitution and Article II, §§ 1, 2, 4, 15 and 24 of the Arizona Constitution.

In Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court held that by not permitting consideration as a mitigating circumstance, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis less than death is a constitutional violation. In *Jeffers v. Lewis*, *supra*, the Ninth Circuit Court of Appeals appears to acknowledge, at least for that case, such a violation by the Arizona Supreme Court.

The *Lockett* court went on to hold that death penalty schemes *must* allow consideration "*as a mitigating factor*, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death". (emphasis added). *Supra*.

In the present case, at sentencing, the court had two experts' reports that concluded that the Petitioner's conduct at the time of the crime was impulsive and without premeditation. Notwithstanding this evidence, the trial court failed to find the Petitioner's impulsive conduct, inability to premeditate, emotional problems and troubled and abused childhood as sufficient mitigating circumstances to outweigh the aggravating circumstances. Instead, the trial court sentenced the Petitioner to death for a crime he committed at age eighteen, a crime he did not intend to commit and a crime for which he suffered great remorse.

There is no indication in the record that the trial court ever even considered impulsivity as a mitigating factor which is a violation of *Lockett*.

In the Minute Entry dated December 14, 1984, R. 806, the trial court explained that it had considered as mitigation the defendants' ages, their unhappy and disrupted childhoods and family lives, the lack of a male role model, their expressed remorse, and the psychiatric and psychological evidence offered on their behalf.

The court then went on to find that there were no mitigating circumstances sufficient to call for leniency or to outweigh the aggravating factors. At no time did the court indicate that it had considered the Petitioner's emotional state at the time of the crime and the fact that he had an undisputed character trait that when he's under extreme stress results in his acting strictly on impulse and in an uncontrollable manner. As indicated in the above argument the trial court's rulings regarding the confessions leads one to assume that the court did not consider this mitigating evidence. This is a clear violation of Lockett, supra.

When this mitigating factor, regarding the Petitioner's capacity, is added to the ones that the court considered, the mitigating factors become "substantial" and would have, if properly weighed, been able to call for leniency even with the finding of the three aggravating factors.

5. Application of the death penalty to the facts of this case constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments to the United States Constitution and Article II, §§ 1, 2, 4, 15 and 24 of the Arizona Constitution.

The mitigating factor of cruel, heinous or depraved has been defined or applied in the manner that requires the state to distinguish the few cases in which the death penalty is warranted from the many in which it is not. Godfrey v. Georgia, 446 U.S. 426, 427 (1980). A person of ordinary sensibility could find that almost every murder fits this stated category. The Arizona Supreme Court has arbitrarily applied this aggravating circumstance to a variety of factual situations.

Application of this aggravating circumstance to the

Petitioner's case is not appropriate. See, Jeffers v. Ricketts, 832 F.2d 476 (9th Cir. 1987), cert granted, 110 S.Ct. 232. To find a crime especially cruel, the court must find beyond a reasonable doubt that the victim was conscious and able to suffer physical pain and mental anguish. Id. Here, the Supreme Court only assumed there was some physical torment before death. See, State v. Walter LaGrand, 153 Ariz. 21, 734 P.2d 563 (1987). Also see, Exhibit D attached to Petition for Habeas. No evidence in the record established this factor beyond a reasonable doubt. No evidence established beyond a reasonable doubt that the Petitioner intended in inflict gratuitous violence upon the victim, that he committed the crime with relish or that he intended to inflict suffering. In fact, the evidence presented was that he never intended to harm anyone and that the actual act was totally impulsive and out of his control. See Exhibits I.

The trial court also found that the crime was heinous and depraved. Both of those factors go the mental state and attitude of the perpetrator as reflected in his words and actions. State v. Lambright, 138 Ariz. 63, 75, 673 P.2d 1 (1983) cert. denied 469 U.S. 892 (1984). "A murder is especially heinous if it is cruel, hateful or shockingly evil." State v. Beaty, 158 Ariz. 232, 762 P.2d 519 (1988) (quoting State v. Knapp, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977). A murder is depraved if "marked by debasement, corruption, perversion or deterioration." Id.

In State v. Gretzler, 135 Ariz. 32, 659 P.2d at 1, the Arizona Supreme Court set forth factors which lead to a finding of heinous and depravity with examples of all but one. They were:

> 1. A relishing of the murder by the killer. See, State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067 (1980) (defendant murdered four people and kept a expended bullet as a grizzly souvenir of his crime.); State v. Bishop, 127 Ariz. 531, 622 P.2d 478 (1980) (defendant killed the victim by repeated blows with hammer, tied him up, caused him to fall down a mine shaft, threw rocks on victim as he lay twitching, drove away saying, "Goodbye, Norman. I hope we never see you again.")
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> 2. Gratuitous violence against the victim. See, State v. Cejay, 126 Ariz. 35, 612 P.2d 491 (1980) (defendant shot a female victim twice, dragged her into another room and shot her four more times in the head for no apparent reason; shot male victim three times and after he had fallen, shot him once more in the back and then kicked him repeatedly when he was unconscious or dead).
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> 3. Needless mutilation of the victim. See, State v. Vickers, 129 Ariz. 506, 633 P.2d 315 (1981) (defendant strangled cell mate, then carved word "bonsai" into victim's back); State v. J.C. Smith, 131 Ariz. 29, 638 P.2d 696 (1981) (defendant mutilated female murder victim's breasts and genitalia).
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> 4. Senselessness of the crime. See, State v. Tison, supra. (unnecessary murder of victims including two year old child, in no position to thwart murder's escape); State v. Ortiz, 131 Ariz. 195, 639 P.2d 1020 (1981), cert. denied, 459 U.S. 882 (1982) (defendant stabbed woman to death and then indiscriminately attacked her children attempting to stab and burn her to death).
>
> 5. Helplessness of the victim.

None of these factors are present in the Petitioner's case. The testimony at the trial indicated that the victim, could have died from any one of five stab wounds. There was no medical evidence that he suffered or that he did not die instantly.

Other more egregious cases have been found not to be heinous or depraved. For example, see, State v. Smith, 138 Ariz. 79, 673 P.2d 17 (1983) (the defendant repeatedly raped a murder victim and requested playing the tape "We are the Champions".); State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983) (the defendant who shot the victim smiled and told the companion that the victim "squealed like a rabbit" when shot); State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979) (the defendant shot the victim in his back, told the groaning victim, "Don't worry...it will be over soon" and shot him again. He then put the body in the victim's own van and abandoned it at the airport); Jeffers v. Ricketts, CA 6-1840 (November 9, 1987) (heinous or depraved finding unconstitutional as applied to the defendant despite evidence that the defendant strangled the victim when she was totally unable to resist, beat the dead victim about the face and reviled her, dragged her body to the shower stall where it remained for three days and then wrapped the body in garbage bags and buried it in a shallow grave in a remote area where wild animals unearthed and devoured the body.)

From the Supreme Court's opinion, it appears that the primary basis for this finding is the court's assumption that the victim did not die instantly, but "suffered some physical torment prior to dying". This conclusion, of course, eliminates any possibility that the victim's killers could have changed their minds. The Arizona Supreme Court's application of this aggravating circumstance to this case has the perverse effect of insuring more deaths, not fewer.

On its face and as applied to the Petitioner, the finding of a heinous, cruel or depraved aggravating circumstance violates the Petitioner's rights under the eighth and fourteenth amendments to the United States Constitution and Article II, §§ 1, 4, and 15 of the Arizona Constitution.

6. The aggravating factor of pecuniary gain

(a) The application of Arizona's pecuniary gain aggravating circumstance to Petitioner's case violates the eighth amendment's prohibition of unreliable sentencing standards in capital cases

Both the trial Judge, Richard Hannah, and the Arizona Supreme Court violated the Petitioner's right to reliable sentencing standards guaranteed by the eighth and the fourteenth amendments to the United States Constitution.

Trial Court

In his findings at the sentencing, Judge Hannah stated the following in relation to the finding of pecuniary gain:

> As to Section 13-703 (F)(5) the Court finds beyond a reasonable doubt that both defendants committed the offense in the expectation of the receipt of something of monetary value. I'm utilizing the definition and analysis of this in the case of State vs. Hensley, sic a recent Arizona Supreme Court case, but my decision would be the same without this factor.

T. 12/14/84, p. 15.

The very case on which the Judge relied, State v. Hensley, 142 Ariz. 598, 691 P.2d 689 (1984), articulated the definition of pecuniary gain, especially related to robberies. The court held that "an unexpected or accidental death that was not in itself during the course of or flight from a robbery, does not in itself provide a sufficient basis for finding (A.R.S. § 13-703 (F) (5))" 142 Ariz. at 403-604. In Hensley, the murders were "part of the overall scheme of the robbery with the specific purpose to facilitate the robbers sic escape." [26]

Similarly, in 1989 the Arizona Supreme Court further articulated the definition of pecuniary gain in State v. Prince, Ariz. 268, 772 P.2d 1121 (1989): "We have repeatedly held that to prove pecuniary gain, the state must show the actor anticipated receiving something of value as a result of the murder... the state must show beyond a reasonable doubt defendant's **purpose** for murdering the victim was the expectation of pecuniary gain." 160 Ariz. at 275, P.2d at 1128. This standard was not applied at the sentencing in the Petitioner's case by Judge Hannah. The evidence at the trial revealed that the robbery was over. The Petitioner and his brother were on their way out, and Karl LaGrand's impulsive acts were in response to Dawn Lopez's hysteria and to the kick by Ken Hartsock. See also, State v. Watson, 129 Ariz. 60, 629 P.2d 943 (19__). Judge Hannah's did not articulate adequately for the record why this factor was being invoked other than citing Hensley. Certainly, a close examination of the record discloses that the presence of pecuniary was not proved "beyond a reasonable doubt."

Appellate Review

The independent review of the record by the Arizona Supreme court also failed to apply the correct standards in the Petitioner's case. Although the Court articulated the standard in State v. Carriger, 143 Ariz. 142, 161, 692 P.2d 991,1010 (1984), cert.

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[26] The defendant had the three victims lie on the floor during the robbery and before leaving the bar shot each victim in turn with the intent that no witnesses be left to identify the robbers. The murders were not unexpected or accidental.

denied, 471 U.S. 1111, 105 S. Ct. 2347, 85 L.Ed.2d 864 (1985). See State v. LaGrand, 153 Ariz. 21, 734 P.2d 563 (1987). The court noted that the Petitioner "may have reacted irrationally to the failure or inability of the victim to open the safe...", 153 Ariz. at 36, 734 P.2d at 578. The Court found that because the Petitioner was at the bank in an attempted robbery, and the fact that the killing occurred during the course of that attempt satisfied the requirements of A.R.S. § 13-703 (F)(5). Indeed, the court seems to articulate a new definition for pecuniary gain. The court stated: "When the defendant comes to rob, the defendant expects pecuniary gain and **this desire infects all other conduct of the defendant.**" (emphasis added) 153 Ariz. at 35, 734 P.2d at 577.[27] The Arizona Supreme Court therefore enunciated a new pecuniary gain standard, ie, robbery equals pecuniary gain. By misapplying the pecuniary gain standard, the Arizona Supreme Court violated the Petitioner's eighth and fourteenth Amendment rights.

A central tenet of eighth amendment is that capital punishment statutes must provide a "principled means ... to distinguish those that received the penalty from those that did not." Maynard v. Cartwright, 108 S.Ct. 1853, 1858 (1988). The United Supreme Court has explained that:

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[27] This language was also cited in one of the most recent cases involving the application of pecuniary gain, State v. Cook, 170 Ariz. 40 821, P.2d 731 (1991):

> "[In LaGrand] We held that the fact the defendant was in the bank to commit a robbery 'infect[ed] all other conduct." 170 Ariz. at 61.

> (t)his means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless (sentencing) discretion". Godfrey v. Georgia, 446 U.S. 420, 428, (1980), quoting Gregg v. Georgia, 428 U.S. 153, 196 (1976).

In Godfrey, the court reversed a death sentence because an aggravating circumstance in Georgia's death penalty statute had been unconstitutionally interpreted in that defendant's case.

The same result is required in the Petitioner's case. the Arizona Supreme Court in the instant case adopted a definition limiting the application of the aggravating circumstance of pecuniary gain in its death penalty statute. However, that same court chose not to apply that limiting definition in one case, Petitioner's. This cannot be squared with the state's constitutional obligation to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey, 446 U.S. 420, 428, quoting Gregg v. Georgia, 428 U.S. 153, 196 (1976); Profitt v. Florida, 428 U.S. 242, (1976); and Woodson v. North Carolina, 428 U.S. 280, (1976).

In Lewis v. Jeffers, 110 S.Ct. 3092 (1990), the Supreme Court adopted the "rational fact finder" test of Jackson v. Virginia, 443

U.S. 307 (1979) to appellate review of whether "a state court's finding of an aggravating circumstance in a particular case ... is arbitrary or capricious..." Jeffers, 110 S.Ct. at 3103. Relief is warranted when "no reasonable sentencer" could have concluded that the aggravating circumstance in question applied to that individual defendant. Id.

(b) In applying a broader definition of the aggravating factor of pecuniary gain, the Arizona Supreme Court has violated Petitioner's right to due process under the Fourteenth Amendment

The Arizona Supreme Court in its decisions in State v. Lagrand, 152 Ariz. 483, 733 P.2d 1066 (1987) and State v. Lagrand, 153 Ariz. 21, 734 P.2d 563 (1987), as indicated above, articulated a standard for pecuniary gain as an aggravating circumstance which was different in that it was broader than the definition existing at the time of the offense. The application of the broader standard and definition to the Petitioner constitutes an ex post facto enlargement of the penalty for murder motivated by pecuniary gain. Therefore his right to due process under the 14th Amendment was violated by that application because an unforeseeable judicial decision enlarging the scope of a criminal statute is applied retroactively to cover behavior not considered unlawful in the past. Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed. 2d 894 (1964). Because of this violation, the Petitioner's right to due process was violated and he should be granted a new sentencing.

7. Methods of Execution: The imposition of death by using lethal gas or lethal injection in Arizona is cruel and unusual punishment in violation of the eighth and fourteenth

amendments to the United States Constitution and Article II, §§ 1, 4, 15 and 24 of the Arizona Constitution

(a) Introduction

There are two methods provided by statute to execute in Arizona. The first is the use of lethal gas. Sodium cyanide pellets wrapped in cheese cloth are lowered into a mixture of sulfuric acid and distilled water. The chemical reaction produces hydrogen cyanide gas, the same gas -- know by its trade name zyklon B -- used by the Nazis to exterminate over a million men and women at Auschwitz-Berkenau.

Throughout the process, which can take over ten minutes, the Petitioner will experience excruciating pain. Initially, the pain will be similar to that of simultaneously suffering a stroke and a heart attack. The pain will spread throughout his body as its hunger for air produces uncontrollable and violent reactions. His body will reflexively produce a massive amount of adrenaline, which will further create a "pounding and rapid heartbeat, an increase in blood pressure, dilation of air passages, and a tightening of sphincters." The Petitioner will eventually suffocate, his heart will stop, and his brain will cease to function, but not before the state has subjected him to excruciating and inhuman pain. This is obviously a cruel method of execution. The use of this type of execution flaunts and violates the common standards of decency and violates the United States Constitution's prohibition against cruel and unusual punishment. Eighth amendment.

(b) Eyewitness accounts of lethal gas executions in Arizona confirm the unnecessary and wanton infliction of pain

The affidavit by James J. Belanger, a licensed attorney in Arizona, See Exhibit X, attests to the horrific death that was executed on Don Eugene Harding on April 6, 1992 in the Arizona state gas chamber. This affidavit supports the medical communities opinion that a prisoner suffers a torturous and lingering death. Since the United States Supreme Court's decision in Furman v. Georgia, supra. there have been seven lethal gas executions conducted. These executions prove that this barbaric method of execution inflicts unnecessary and extreme pain.

Donald Harding's execution here in Arizona on April 6, 1992, is but one horrible example. Donald Harding's execution was the first lethal gas execution in the state of Arizona since 1963, and because of the agonizing, torturous and dehumanizing manner by which Mr. Harding died, the state legislature adopted an alternative method of execution by fatal injection. It is up to the defendant to determine which method he would prefer to die by.

Two of the witnesses to Mr. Harding's death, Carla McClain and Donna Hamm, described that Mr. Harding immediately began to "moan and groan very loudly, loudly enough" for the witnesses to "hear through the extremely thick metal walls" of the gas chamber. It was like a "low guttural sound of shear torment". James J. Belanger See affidavit, Exhibit X, described the execution of Mr. Harding: "His face was red and contorted as if he attempting to fight through tremendous pain". For endless minutes, Mr. Harding gasped and choked as his body strained for oxygen. The agony that Mr. Harding experienced during the state imposed suffocation was obvious to all that witnessed the execution: Mr. Harding's "skin turned bright, bright red from face all the way through his chest and that's the capillaries of his circulatory system bursting inside his chest and blood filling his chest cavity there and he was almost a kind of a purple and his strained." Statement by Carla McClain. Another witness stated that "at this point, Don's body started convulsing violently and his arms stained against the straps. His face and body turned a deep red and the veins in his temple and neck began to bulge until I thought they might explode." Belinger affidavit, Exhibit X.

After several minutes, Mr. Harding's head dropped to his chest, and horrified witnesses hoped and prayed that his suffering was over. But just as relief came over the witnesses, Mr. Harding raised his head, twitching and gasping. Mr. Harding's suffering did not end for several minutes. Most common, if not all, witnesses to Mr. Harding's execution, including Arizona's Attorney General, agreed that the state must switch to another form of execution to avoid the needless pain and suffering caused by lethal gas. Attorney General Woods stated that viewing the execution "solidified" his opinion the state should switch to lethal injection. Phoenix Gazette article, April 7, 1992.

The latest execution by gas was in California, shortly after Don Harding's execution. Robert Harris' death also confirmed the horrors of executing by lethal gas.

(c) Execution by lethal gas violates contemporary standards of decency

As shown above, death by lethal gas is brutal, agonizing and cruel. It is also unusual, given the infrequency of its use and the virtual unanimous abandonment of it and a method of execution. *Thompson v. Oklahoma*, 487 U.S. 815, 822, n.7 (plurality opinion).

Of the thirty-eight United States jurisdictions that have the death penalty, only three states -- Arizona, California and Maryland -- still execution by gas. Of these three, only two, Arizona and California, have had an execution since the 1976 Supreme Court decision in *Gregg v. Georgia*, 428 U.S. 153 (1976): Don Harding in Arizona and Robert Harris in California. Arizona has passed legislation to allow a defendant sentenced to be executed to pick his method of execution -- gas chamber or fatal injection. A poll taken in Arizona between March 26 and March 29, 1992 by the *Arizona Republic*, showed that 70% of the respondents believed lethal injection to be more humane. Interestingly, that was before Donald Harding's gruesome execution on April 6, 1992, which no doubt offers further support to the crusade to abolish torturous lethal gas executions in this state.

All other states that have utilized the gas chamber in the past have abandoned it in favor of more humane methods. In fact, use of the gas chamber as a method of execution is so aberrational that it must be considered unacceptable in our society. Of the approximately 20 legislatures who have adopted new methods of execution since *Gregg*, *supra*, not one has chosen lethal gas as a means of execution.

New Mexico was the first state to discard the gas chamber for lethal injection when it enacted its post-Furman capital punishment scheme in 1979. New Mexico Statutes Annotated § 31-14-11 (1991). The last man executed in the New Mexico gas chamber was David Cooper Nelson in January of 1960.

Following the violent execution of Jesse Bishop, lethal injection was adopted in Nevada in 1983. Nevada Revised Statutes Annotated § 176.355 (1991). Prior to Mr. Bishop's execution, no one had died in the Nevada gas chamber for 18 years.

Also in 1983, North Carolina amended their execution statute to give inmates the ability to choose whether to die in the gas chamber or by lethal injection. North Carolina General Statutes § 15-187. Not surprisingly, the four men and women who have since been executed have all consciously chosen to avoid the painful death inflicted by lethal gas.

After Jimmy Lee Gray's torturous execution of September 2, 1993, Mississippi abandoned the gas chamber in favor of lethal injection for those sentenced after July 1, 1984. Mississippi Code Annotated § 99-19-51. Prior to the execution of Jimmy Lee Gray, Mississippi had last used the gas chamber in 1964.

Wyoming also abandoned gas for lethal injection in June of 1984. Wyoming H.B. 175. The switch to lethal injection was embraced by law makers as a more humane means of execution. Prior to the change in the law, the last person to have been executed in the Wyoming gas chamber was Andrew Pixley in 1964.

Oregon also switched to lethal injection when it reenacted capital punishment in 1984. The last person to die by gas in Oregon in Lee Roy Stanford McGahuey on August 20, 1962.

In 1988, as Missouri readied to resume executions, the state abandoned the gas chamber in favor of lethal injection. Missouri H.B. 1340, 1348; Mo. R. S. § 546.720 (1990). Although the statute provides for death by lethal gas or lethal injection, the director of the Missouri Department of Corrections, Dick Moore, immediately announced his intention to use only lethal injection. In fact, all six persons who have been executed in Missouri since Furman have died by lethal injection. The last man executed in the Missouri gas chamber was Lloyd Leo Anderson on February 26, 1965.

Colorado's rejection of the gas chamber came in 1988 when they adopted lethal injection. Colo. Rev. Stat. 16-11-401 (1991). In a poll conducted in March of 1989, only 8% of the respondents thought the Colorado should utilize the gas chamber. The last man executed in the Colorado gas chamber was Louis Jose Monge on June 2, 1967.

The virtual unanimous rejection of lethal gas as an acceptable method of execution demonstrates that its continued use in Arizona is a violation of the evolving standards of decency.

In Enmund v. Florida, 458 U.S. 782 (1982), the court struck down as cruel and unusual the imposition of a death penalty on a participant in a felony who neither killed nor attempted to kill, and was not shown to have intended death. In determining that execution of Enmund would offend the constitutional prohibition against cruel and unusual punishment, the court emphasized that only eight jurisdictions authorize similar punishment. Id. at 792. Here, there are only three states that continue to use lethal gas.

Similarly, in Cocker v. Georgia, 433 U.S. 584 (1977), the United States Supreme Court declared cruel and unusual the infliction of the death penalty for the rape of an adult woman. In so deciding, the plurality found particular significance in the fact that as the states reenacted death penalty laws after Furman, only three provided for death for the crime of rape.[36]

The United States Supreme Court has found that the most reliable indication of a national consensus is the pattern of the laws enacted by the states. Stanford v. Kentucky, 439 U.S. 361, 373 (1989). The pattern of laws as to the methods of execution establishes irrefutably that the gas chamber has been rejected as an unnecessarily cruel and inhumane method of execution.

These legislative decisions to abandon the gas chamber find strong public support. Back in 1953, the American public strongly favored electrocution over lethal gas. 1953 Gallop poll. After lethal injection was introduced as a method of execution, it was immediately identified by the public as the most humane option. In a 1985 Gallop poll, only 8% of respondents believed lethal gas was more humane. Similarly, in a 1991 Gallop poll, only a small percentage of American favored the gas chamber.

---

[36] Notably, in Coker, the court was evaluating three relatively recently enacted statutes, which reflected current attitudes. In contrast, the statutes mandating use of lethal gas in Arizona, California and Maryland were enacted in 1933, 1937 and 1955, respectively. Thus, the relevant statutes of those states are not even reflective of contemporary standards of decency of the state's citizenry and are clearly outdated in light of current knowledge about the suffering inherent in execution by lethal gas and the availability of more humane alternatives.

(d) Use of the gas chamber constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments to the United States Constitution

The United States Supreme Court has condemned as violative of the eighth amendment all punishments that inflict torture or lingering death, In re: Kemmler, 136 U.S. 436, 447 (1890), and punishments that "involve the unnecessary and wanton infliction of pain." Hudson v. McMillan, 503 U.S. _____, 117 L.Ed.2d 156 (1992). Moreover, "No court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives." Furman v. Georgia, 408 U.S. 238, 430 (1972) (dissenting opinion of Powell, J., joined by Burger, C.J., Blackmun, J., and Rehnquist, J.).

In discerning these "evolving standards", the courts look to objective evidence of how our society views a particular punishment today. See, Coker v. Georgia, 433 U.S. 584, at 593-597 (1977); Enmund v. Florida, 458 U.S. 782, 788-796 (1982). "The clearest and most reliable evidence of contemporary values is the legislation enacted by the country's legislatures." Penry v. Lynaugh, 492 U.S. 302, 331 (1989).

(e) The imposition of death by lethal injection in Arizona is cruel and unusual punishment in violation of the eighth and fourteenth amendments to the United States Constitution and Article II, §§ 1, 4, 15 and 24 of the Arizona Constitution

After the horrific execution of Donald Harding on April 6, 1992, the Arizona legislature amended their statutes to provide an alternative to the gas chamber -- lethal injection. On March 3, 1993, John George Brewer was put to death by the State of Arizona utilizing the new method -- lethal injection. The Arizona legislature was wrong. Executing by lethal injection is not any more humane than executing by the gas chamber. It is just as disturbing and horrific as execution by the gas chamber as explained in the argument above.

One witness, Jim Erickson, a reporter for the Arizona Daily Star, described what he saw:

> About one minute after the blinds opened -- approximately 30 seconds after the first of three killer drugs was administered -- Brewer jerked his neck sharply to the left, in the direction of the executioners in the 'operations room', then stared back at the ceiling. His chest heaved, then he was motionless.
>
> * * *
>
> But don't let anyone tell you that John George Brewer 'went to sleep' yesterday morning in Florence. We killed him.

See Exhibit Y.

The Petitioner respectfully requests that with respect to execution by legal injection, this court adopt the arguments against execution by lethal gas made above. Execution by lethal injection is just as inhumane, cruel and unusual a punishment as execution in the gas chamber.

Just as legislatures found that execution by electrocution was inhumane, and they changed the method to lethal gas, we should also now find that lethal injection is just as inhumane as electrocution and lethal gas.

8. Evidence of the Petitioner's prior criminal and juvenile records should not have been considered as an aggravating circumstance by the trial court at sentencing

The pre-sentence report at the sentencing hearing discussed the Petitioner's prior record, including his juvenile records and attached a pre-sentence report from a previous conviction. See Exhibit V. Evidence of the Petitioner's prior criminal and juvenile record should not have been considered as an aggravating circumstance by the trial court at sentencing. The admission and consideration of this evidence violated the Petitioner's right to a fair death sentencing procedure under the eighth and fourteenth amendments to the United States Constitution and Article II, §§ 1, 4, and 15 of the Arizona Constitution. The United States Supreme Court in *Gardner v. Florida*, 430 U.S. 349 (1977) held that reliance on confidential pre-sentence reports by a court violated the eighth and fourteenth amendments to the United States Constitution. The Petitioner has a right to reliable procedures at the sentencing phase of a capital trial. *Id*.

A review of the pre-sentence report affirms not only the lack of participation on behalf of defense counsel (since no mitigating evidence was included within the report, nor a statement from the defendant, nor a separate sentencing memo prepared and submitted) but it also fails to accurately and completely represent the true situation behind the convictions included within.

No evidence regarding the Petitioner's mental history, which dated back to his teens, was even mentioned, no educational history nor any school records were ever reviewed or submitted to the court. Where there is absolutely no investigation, a court can find not only that the trial counsel was ineffective, but that it resulted in an unfair sentencing. Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987).

The Petitioner obviously acted on impulse; however, no evidence was presented to bolster this major defense. Trial counsel did argue in his close to some extent impulsivity and in his remarks to the trial judge at sentencing the impulsive actions were discussed; however, no experts were presented nor was any preparation, development or investigation regarding this defense during the trial. Deutsher v. Whitley, 884 F.2d 1152 (9th Cir. 1989); Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988). In Deutsher, the trial counsel was aware that the petitioner had been hospitalized for mental problems in the past. The court said he should have called the doctors or submitted evidence regarding those mental problems at the time of sentencing. Having a doctor called as a witness can make a difference. After all, consideration of such evidence is a constitutionally indispensable part of the process of inflicting the penalty of death. California v. Brown, 479 U.S. 538 (1987) (quoting Woodson v. North Carolina, supra.).

In California v. Brown, supra, 479 U.S. at 554, the court states:

> We do not presume prejudice in a case such

> as this, we must be especially cautious in protecting a defendant's right to effective counsel at a capital sentencing hearing. The constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy.

(emphasis added).

In the present situation, the sentencing was a travesty of justice. There was basically no evidence presented and the court did not have the relevant information provided so that it could make an intelligent, informed decision regarding sentencing. The trial court was provided only the negative aspects of the Petitioner's life in the pre-sentence reports and none of the exculpatory or mitigating evidence that clearly existed and would have been easy to locate and present through the probation officer on in a separate pleading by defense counsel.

V. CONCLUSION

The accumulation of errors in the Petitioner's case rises to the level of a denial of fundamental fairness. When a number of errors, none of which alone necessarily rises to a denial of due process, accumulate to deprive an individual of his right to a fair trial and a fair sentencing, the tainted result must be reversed as a violation of the sixth and fourteenth amendments to the United States Constitution and Article II, Sections 1, 2, 4, 15 and 24 of the Arizona Constitution. See also Mills v. Maryland, 486 U.S. 367 (1988); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991).

For all of the foregoing reasons, counsel requests relief as follows:

(1) Grant an evidentiary hearing;

(2) Reverse the Petitioner's convictions and remand for a new trial;

(3) Vacate the sentence of death and order the imposition of a life sentence; and/or

(4) Remand to the state court for an evidentiary hearing on the Petitioner's claims that the court deems necessary.

RESPECTFULLY SUBMITTED this 8th day of March, 1993.

LAW OFFICES OF CARLA G. RYAN

By Carla G Ryan
CARLA G. RYAN
Co-counsel for Petitioner

LAW OFFICES OF LAWRENCE B. WEEKS

By Carla G Ryan
for LAWRENCE B. WEEKS
Co-counsel for Petitioner

I, certify that on the 8th day of March, 1993, I caused to be mailed, first class, postage prepaid, a copy of this pleading to:

Diane M. Ramsey
Assistant Attorney General
Criminal Appeals Section
1275 W. Washington, 1st Floor
Phoenix, Arizona 85007

Arizona Capital Representation Project
Arizona State University
College of Law
Tempe, Arizona 85287-0604

Tom Marlowe
Death Penalty Law Clerk
U.S. District Court
District of Arizona
U.S. Courthouse
230 North First Avenue
Phoenix, Arizona 85025

Karl LaGrand
C/O Arizona State Prison
P.O. Box B-4849
Florence, Arizona 85232

Carla G Ryan

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CLERK SUPREME COURT

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,)
Appellee,) Supreme Court No. 6456
vs.) Pima County No. CR-07426
KARL HINZE LaGRAND,)
Appellant.)

STATE OF ARIZONA,)
Appellee,) Supreme Court No. 6457
vs.) Pima County No. CR-07426
WALTER BURNHART LaGRAND,)
Appellant.) ORDER

Upon the Court's own motion,

IT IS ORDERED consolidating the above-entitled actions for the purposes of Oral Argument.

IT IS FURTHER ORDERED setting oral argument for Thursday, December 19, 1985, at 9:30 a.m.

IT IS FURTHER ORDERED that Appellants shall have 25 minutes each and Appellee shall have 30 minutes.

DATED this 3rd day of December, 1985.

William A Holohan
WILLIAM A. HOLOHAN
Chief Justice

TO:

Bruce A. Burke, Esq., O'Dowd, Burke & Lundquist
Stephen M. Weiss, Esq., and Elizabeth F. Claiborne, Esq., Karp, Stolkin & Weiss
Hon. Robert K. Corbin, Attorney General - Attn: William J. Schafer III, Esq., and Diane M. Ramsey, Esq.

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State Bar No: 004273
Co-counsel for Petitioner

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State Bar No: 004254
Co-counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

KARL HINZE LaGRAND, Petitioner, vs. SAMUEL LEWIS, Director, Arizona Department of Corrections, Respondent, GRANT WOODS, Attorney General of the State of Arizona Additional Respondent.	NO: CIV 92-026 TUC JMR **AFFIDAVIT**

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

DAVID GERSON, upon his oath, deposes and states as follows:

1. That your affiant is licensed to practice in the State of Arizona. That your affiant was admitted to practice in Arizona in 1974. However, he did not start to practice immediately and at that time that he was appointed to represent Karl LaGrand, he had had approximately six to seven years'

experience;

2. That when your affiant was appointed to represent Karl LaGrand, in 1983, it was the first time that he had represented a defendant in a capital murder case;

3. That at the time of his appointment, your affiant had no special CLE training in handling a capital case and that your affiant was uninformed of the level of experience and tasks and tactics and strategies which capital cases required;

4. That your affiant initially approached the Karl LaGrand murder defense case as he had his previous criminal cases: like a "normal felony, just as a drug case or a robbery";

5. That in hindsight, your affiant realizes he was neither prepared nor informed as to what would be involved and that your affiant was unquestionably overwhelmed both by the high profile nature of the case and by of his lack of experience;

6. That when Tom Higgins originally contacted your affiant about accepting this appointment, your affiant had grave concerns, however, Tom Higgins advised your affiant that once the motion to suppress Karl LaGrand's incriminating statements was granted, your affiant would be able to plead Karl LaGrand to a life sentence;

7. Although Higgins was available to meet with your affiant; they never strategized nor discussed potential defenses and work to be done in this case;

8. That your affiant never had an investigator assigned to work on this case;

9. That your affiant did not speak to family members;

10. That your affiant had a poor relationship with Mr. LaGrand and there was little or communication between them;

11. That because Mr. LaGrand was serving time at the Arizona State Prison in Florence, it was difficult for your affiant to establish an adequate attorney-client relationship. Therefore your affiant was unable to explore with his client his childhood and adolescent years in order to uncover evidence which would be helpful in the trial or at the penalty stage of the case;

12. That your affiant never comprehensively researched, investigated or developed any evidence regarding the petitioner's mental state;

13. That your affiant never considered impulsivity or temporary insanity as a viable defense;

14. That if your affiant was appointed to handle this case today, that your affiant would do several things differently; including, but limited to:

a. Your affiant would approach the psychological evaluations differently. Your affiant now believes that the evaluations performed in 1983 and 1984 were insufficient and uninformed. Your affiant would provide relevant documentation of family history, school records, juvenile court records, and meet with the psychological expert prior to the expert meeting with Karl LaGrand.

b. Your affiant would hire an investigator immediately;

c. Your affiant would interview all witnesses prior to trial and not rely on transcripts and typed statements or medical reports;

d. Your affiant would certainly consider defenses such as impulsivity, temporary insanity, as well as other legal issues that were not utilized in 1983;

e. That your affiant would, as of his first day of appointment, begin working on mitigation and developing evidence of the petitioner's background and evidence of extent of the dysfunctionality of the family rather than waiting until after the verdict to consider the penalty phase.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated this 5th day of ~~February~~ March, 1993.

David Gerson

SUBSCRIBED AND SWORN to before me this 5th day of ~~February~~ March, 1993 by DAVID GERSON.

Notary Public

I, certify that on the _____ day of March, 1993, I caused to be mailed, first class, postage prepaid, a copy of this pleading to:

Diane M. Ramsey
Assistant Attorney General
Criminal Appeals Section
1275 W. Washington, 1st Floor
Phoenix, Arizona 85007

Arizona Capital Representation Project
Arizona State University
College of Law
Tempe, Arizona 85287-0604

Tom Marlowe
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Karl LaGrand
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____

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Co-counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

KARL HINZE LaGRAND,
Petitioner,
vs.
SAMUEL LEWIS, Director,
Arizona Department of
Corrections,
Respondent,
GRANT WOODS, Attorney General
of the State of Arizona
Additional Respondent.

NO: CIV 92-076 TUC JMR

AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

TOM HIGGINS, upon his oath, deposes and states as follows:

1. That your affiant is licensed to practice in the state of Arizona and has been practicing criminal law in the state of Arizona for over 17 years;

2. That your affiant's practice has consisted almost exclusively of criminal law and your affiant has practiced

extensively in state and federal courts in Tucson;

3. That your affiant has represented numerous individuals charged with first degree murder and has tried many such cases, several of them being potential capital cases;

4. That your affiant was originally appointed by the presiding judge to represent Karl LaGrand after the Pima County Public Defender's Office withdrew because of a conflict;

5. That your affiant represented Karl LaGrand through the motion to suppress his statements, which was won;

6. After winning on the motion to suppress the statements, your affiant approached the trial judge, Judge Hannah, and requested to be allowed to withdraw because he did not have enough time to further develop and adequately and competently represent Karl LaGrand in a capital case because of your affiant's case load;

7. That Judge Hannah would not allow your affiant to withdraw, but agreed to allow your affiant to substitute in additional counsel as long as your affiant was willing and available to consult with the new counsel;

8. That your affiant agreed to be available to assist;

9. That David Gerson and your affiant conferred about Mr. Gerson assuming representation of Mr. LaGrand;

10. That your affiant met with Mr. Gerson and discussed the case at length, including the fact that in his opinion

this was a trial case and one that the State would never offer a plea and would definitely pursue a death sentence;

11. Your affiant further explained the work that needed to be done for both the guilt phase and penalty phase was substantial and immediate;

12. That your affiant had concerns about David Gerson handling the case because of Gerson's inexperience in handling capital murder cases; however, your affiant felt that if Gerson was working with co-counsel (the counsel for Walter LaGrand) and had the benefit of that guidence, he would be able to handle the case;

13. That your affiant further felt that Gerson had the time to adequately prepare and to investigate all of the potential defenses and mitigation to be presented at the penalty phase;

14. Gerson never asked your affiant for assistance or indicated that he needed help of any kind once he took over representation of Mr. LaGrand

15. Your affiant discussed in detail with David Gerson the potential defenses, including: implicating Walter LaGrand as the perpetrator or the impulsivity defense. Your affiant felt there were competency issues and potential McNoughton issues that needed to be developed and that there were publicity problems, as well as tactical decisions to be made such as whether to request a severance for Walter LaGrand's trial;

16. That Gerson took over the responsibility on the case before your affiant had located and hired potential experts and before he started any background check on the petitioner.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated this 1 day of ~~January~~ march, 1993.

Thomas E. Higgins Jr

Tom Higgins

SUBSCRIBED AND SWORN to before me this 1 day of ~~January~~ march, 1993 by TOM HIGGINS.

Kelly Clausen

Notary Public

My commission expires:

May 31, 1994

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

KARL HINZE LaGRAND, Petitioner, vs. SAMUEL LEWIS, Director, Arizona Department of Corrections, Respondent, GRANT WOODS, Attorney General of the State of Arizona Additional Respondent.	NO: CIV 92-026 TUC JMR AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

Bruce A. Burke, upon his oath, deposes and states as follows:

1. That I am an attorney licensed to practice in the State of Arizona, and that I was admitted to the Arizona Bar in October, 1975.

2. On January 24, 1983, I was appointed to defend Walter

LaGrand in the case of *State v. LaGrand*, No. CR-7426. The other defendant in the case was Karl LaGrand, Walter LaGrand's brother, who was represented by David Gerson, an attorney in Tucson.

3. From the very beginning of my representation of Mr. LaGrand it was clear to me that the State would seek the death penalty for the Defendants if they were convicted of first degree murder. I tried without success to negotiate a plea to a life sentence. The State refused to offer a plea to a life sentence.

4. During the proceedings at the trial itself, I can recall no instance when David Gerson and I communicated in advance of a witnesses' testimony about what questions I should ask or not ask of the of the witness.

5. Prior to giving his closing argument on behalf of Karl LaGrand, I recall that Mr. Gerson informed me that he had "cribbed" substantial portions of the closing argument on the issue of reasonable doubt from another criminal case handled by another attorney.

Dated this 7th day of March, 1993.

Bruce A. Burke

SUBSCRIBED AND SWORN to before me this 7 day of March, 1993 by Bruce A. Burke.

Notary Public

My Commission Expires: 2-7-95

LAW OFFICES OF LAWRENCE B. WEEKS
Arizona State University
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Co-counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

KARL HINZE LaGRAND, Petitioner, vs. SAMUEL LEWIS, Director, Arizona Department of Corrections, Respondent, GRANT WOODS, Attorney General of the State of Arizona Additional Respondent.	NO: CIV 92-026 TUC JMR AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

ROBERT J. HIRSH, upon his oath, deposes and states as follows:

1. That your affiant is licensed to practice in the state of Arizona and has been practicing criminal law in the state of Arizona for over 28 years;

2. That your affiant has been certified as a specialist in criminal law by the State Bar Association;

3. That your affiant's practice has consisted almost exclusively of criminal law and your affiant has practiced extensively in state and federal courts in Tucson;

4. That your affiant has represented numerous individuals charged with first degree murder and has tried many such cases, several of them being potential capital cases;

5. That your affiant has tried many cases involving the defense of insanity, temporary insanity or impulsivity pursuant to State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981), and is familiar with the procedures which must be followed by a defense attorney to competently pursue these types of defenses under Arizona state law;

6. That under Rule 15 of the Arizona Rules of Criminal Procedure, defense counsel is entitled to interview the state's witnesses in advance of trial. Based upon your affiant's familiarity with the state criminal justice system, your affiant believes that pre-trial interviews, pursuant to Rule 15, with the state's witnesses are an essential part of the preparation of the defense of any case. In cases in which a confession is obtained and will the thought to be introduced against an accused, it is vital to the defense that all police officers who participated in the events leading up to the interrogation, any doctors or hospital staff involved in the interrogation and the interrogation itself, be interviewed in advance of the motion to suppress in order to effectively

present the issues to the court relevant to a motion to suppress that statement or to make a strategic decision as to how to best utilize the confession and if it should be suppressed;

7. Your affiant believes that it is essential that interviews with all the detectives who participated in the investigation of the case against the accused, and all other state's witnesses, be interviewed, both to critically examine their testimony from the perspective of cross-examination and to explore the possible exculpatory evidence;

8. That your affiant believes that it is absolutely essential that psychiatrist to be called by the state to rebut a defense of insanity be interviewed thoroughly in advance of trial. Your affiant believes that pre-trial interviews of the state's psychiatrists in such circumstances are invaluable, both from the perspective of developing information to challenge the conclusions of the witnesses that the defendant was "sane" and to develop potentially exculpatory evidence and information tending to prove that the defendant was not sane;

9. That your affiant believes that it is absolutely essential that psychiatrists be adequately prepared prior to their interview with a particular defendant and to be educated regarding the defense of insanity, impulsivity or temporary insanity;

10. That your affiant believes that the failure to interview the state's psychiatrists, investigating detectives,

and all other state witnesses and officers participating in an interrogation of an accused, and all other state witnesses in a case in which the defendant is charged with first degree murder and the potential defenses are insanity, impulsivity or temporary insanity, falls below minimal standards of competence required of attorneys to practice in state courts under the rules of procedure in existence in the state of Arizona. Your affiant can conceive of no circumstances in which your affiant would not conduct such witness interviews, in the absence of extraordinary tactical circumstances;

11. Your affiant further believes that it is imperative that in an insanity case, impulsivity or temporary insanity case, all exculpatory materials, such as prior hospitalizations, school records, juvenile detention records, home placements, family members and other potential witness statements all be provided to mental health experts who will evaluate the defendant. Moreover, these records should be sent to the experts before they examine the accused, since it is much easier to initially persuade the expert that the accused is insane than to change his opinion after he has committed himself to an opinion of sanity. Failure of counsel to do so, falls below minimum standards of effective assistance of counsel;

12. Your affiant further believes that trial counsel needs to be the advocate and to aggressively search out experts to substantiate the defense of insanity, impulsivity

or temporary insanity and not to allow the experts to, with limited information, make the initial decision. Failure of counsel to do so, falls below minimum standards of effective assistance of counsel.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated this 1st day of ~~January~~ March, 1993.

Robert J. Hirsh

SUBSCRIBED AND SWORN to before me this 1st day of ~~January~~ March, 1993 by ROBERT J. HIRSH.

Catharine H. Raue
Notary Public

My commission expires:
10-10-94

AFFIDAVIT

STATE OF ARIZONA)
)ss
COUNTY OF PIMA)

I, **Richard W. Bozich**, of **Western Investigative Services** first being duly sworn does depose and state:

1. Affiant was retained by defense counsel, **Carla Ryan** and **Larry Weeks**;

2. Affiant has reviewed all of States disclosures;

3. Affiant has found that certain mitigating circumstances were omitted, overlooked and disregarded, to wit:

A. The trial attorney for **Karl LaGrand** did not conduct his own investigations nor did he retain an investigator;

B. Crime scene photographs/inspection was not made;

C. Witnesses were not thoroughly interviewed or potential witnesses were not located and interviewed, to wit:

1. Mother, sister, family members, stepfather, friends, foster parents, prior probation officers, prior mental health providers, juvenile counselors and neighbors in Sierra Vista;

D. Stepfathers military record was not obtained;

E. Lack of extensive interviews with **Karl LaGrand**;

F. Failure to obtain parents divorce records;

G. Juvenile records were not obtained;

H. School records were not obtained;

I. Medical records were not obtained;

J. An independent psychological evaluation was not made:

K. Discrepancies between victims statements and confessions went unchallenged:

4. Affiant has, in his investigation, discovered certain evidence and witnesses that could have and should have been brought to the attention of the trial court on behalf of **Karl LaGrand**, to wit:

A. Affiant has interviewed foster parents and has learned that **Karl LaGrand** was definitely a very shy and passive individual - that he never initiated or instigated any wrongdoing - that **Karl LaGrand** was most certainly a follower and would always listen to his brother **Walter**;

B. Affiant has interviewed both the mother and sister of **Karl LaGrand** and learned that **Karl** had suffered abuse at the hands of his stepfather - that during his formative childhood he was placed in a German orphanage by his stepfather - it was also learned that **Karl LaGrand** also suffered abuse by his mother through lack of control and neglect - further, it was learned that **Karl LaGrand** had consistently gotten into trouble as a juvenile and that this occurred always when he was with his brother **Walter** or at the direction of **Walter** an example being that of setting fire to a golf course - both the mother and sister to **Karl** related incidents of personal injury such as **Karl** being hit in the head with a shoe, falling off a bike and injuring his head - that the stepfather was an alcoholic with a violent temper - that there was always potential for racial problems due to **Karls** stepfather being black and his mother being caucasian:

C. Affiant has interviewed both Juvenile and Adult Probation Officers who all concur that **Karl LaGrand** was extremely passive, non-violent, immature, and easily led - Probation Officer **Langlois** stated that he never had any problems with **Karl** and felt that all existing problems were caused by **Walter LaGrand**. **Langlois** stated further that he documented this and formally requested that **Karl LaGrand** and **Walter LaGrand** be separated. **Langlois** also stated that he felt strongly that **Karl LaGrand** could be rehabilitated;

D. Affiant has interviewed Juvenile Detention/Center authorities who all concur that **Karl LaGrand** was not the problem and that he was always led into difficult or illegal circumstances by his brother **Walter**;

E. Affiant has requested and received certain records from both Juvenile Authorities and Medical Centers;

F. Affiant has requested further information and records from all public and private institutions in which the defendant was affiliated with; and

5. Affiant has, after review of the aforementioned, does conclude that there are, in fact, many mitigating circumstances to support a new trial and/or in the alternative support a new hearing on the penalty phase.

Affiant sayeth nothing further.

DATED this 8th day of March, 1993

Richard W Bozich

RICHARD W BOZICH

SUBSCRIBED AND SWORN to before me this 8th day of March, 1993, by **Richard W. Bozich** of **Western Investigative Services.**

VIVIAN A. BOZICH
NOTARY PUBLIC

NOTARY PUBLIC

My Commission Expires:

____

LAW OFFICES OF CARLA G. RYAN
6987 North Oracle Road
Tucson, Arizona 85704
(602) 297-1113
State Bar No: 004254
Co-counsel for Petitioner

LAW OFFICES OF LAWRENCE B. WEEKS
Arizona State University
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State Bar No: 004273
Co-counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

KARL HINZE LaGRAND, Petitioner,	NO: CIV 92-026 TUC JMR
vs.	
SAMUEL LEWIS, Director, Arizona Department of Corrections, Respondent,	**AFFIDAVIT**
GRANT WOODS, Attorney General of the State of Arizona Additional Respondent.	

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

JOSEPH N. LANGLOIS, upon his oath, deposes and states as follows:

1. That your affiant was a juvenile probation officer in the State of Arizona, County of Cochise for approximately 22 years;

2. That your affiant first met Karl and Walter LaGrand in approximately 1973;

3. That your affiant was primarily responsible for Karl;

4. That Karl LaGrand's step-father had a violent temperament;

5. That Mrs. Emma LaGrand, Karl's mother, did not know how to handle the child and had no parenting skills whatsoever;

6. That Karl's mother objected to Karl being placed in the Vision Quest street program because it required her to participate in certain portions and she did not want participate;

7. That during the eight years that your affiant worked with Karl, most of Karl's actions were of the "incorrigible-type"; such as running away, disobedience, shoplifting;

8. That in your affiant's opinion Walter was more direct and the leader and Karl followed Walter;

9. That Karl was more of a pacifist;

10. That Walter would attempt to shift the blame on to Karl when the two would get caught;

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11. That your affiant trusted and liked Karl a lot.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated this ____ day of March, 1993.

Joseph N. Langlois

Joseph N. Langlois

SUBSCRIBED AND SWORN to before me this 3 day of March, 1993 by JOSEPH N. LANGLOIS.

Kathy [illegible]

Notary Public

My commission expires: My Commission Expires Jan. 11, 1994

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

KARL HINZE LaGRAND, Petitioner, vs. SAMUEL LEWIS, Director, Arizona Department of Corrections, Respondent, GRANT WOODS, Attorney General of the State of Arizona Additional Respondent.	NO: CIV 92-026 TUC JMR A F F I D A V I T

Affiant, Timothy J. Derning, Ph.D., M.S.Ed., being first duly sworn upon his oath, deposes and states that:

I am a clinical psychologist licensed to practice in the State of California. I specialize in the assessment and treatment of poorly-controlled, impulsive, dangerous, or violent behavior disorders, mental illness, psychopathology, abuse trauma, mental retardation, and learning disorders. I have a private practice in Walnut Creek, California, in which I treat adults and children regarding issues of impulse control and attention deficit disorders, conduct disorders, low self-esteem, family and interpersonal problems, depression, post-traumatic disorder, and issues related to alcoholics and abusive families of origin. I provide consultation to families and schools of youngsters with disruptive behavior disorder. I also conduct psychological and neuropsychological assessments relative to intelligence, cognitive functioning, problems in learning, developmental delay, mental retardation, personality functioning, psychopathology and mental illness.

I also am employed as a Clinical Staff Psychologist in the Forensics Program of Stockton Developmental Center (SDC), a state hospital in Stockton, California. Currently, I serve as Chair of the Department of Psychology at SDC. My clinical responsibilities at SDC include the assessment and treatment of behavior disorders, cognitive functioning, and psychopathology, in addition to assessing competency to stand trial. As staff psychologist in the Forensics program, I routinely present expert testimony to the courts regarding issues of dangerousness, mental illness and psychopathology, and placement recommendations.

I am retained as consulting psychologist to Las Trampas, Inc., a residential and community-based program for the mentally retarded in Lafayette, California. I have continued post-doctoral training in neuropsychology, learning disorders and cognitive deficits through the Continuing Education

Program of the California School of Professional Psychology in Alameda/Berkeley, California.

I received my Baccalaureate Degree in Psychology at the University of Wisconsin-Parkside, a Masters Degree in Counselor Education from Northern Illinois University, a Masters Degree and Doctoral Degree (Ph.D.) in Clinical Psychology from the California School of Professional Psychology at Berkeley.

At the request of counsel for Mr. Karl LaGrand, I reviewed numerous records and documents of approximately 900 pages. By means of clinical interview, psychological tests and record review, I was asked to evaluate the nature and extent of abusive and traumatic experiences endured by Karl LaGrand during his formative years as well as the long-term impact these experiences may have had on his psychological and characterological development. I was also asked to form an opinion regarding Karl LaGrand's mental state at the time of the crime. Finally, I was also asked to form an opinion as to whether these mitigating factors were sufficiently investigated, developed and explained for the benefit of the court in deciding matters relative to Karl LaGrand's case.

The documents I was given contained, but were not limited to, the following:

a. The school records from the Arizona Department of Education;

b. Psychological report of June 30, 1977 by Richard Dymeck, certified school psychologist;

c. Psychological report dated April 6, 1978 by Jean Chambers, Ph.D.;

d. Police reports and police investigation reports from Sierra Vista, Arizona dated January 21, 1975;

e. Records and progress reports from Vision Quest;

f. Records and progress reports from Youth Opportunity Unlimited (YOU);

g. Testimony from the aggravation/mitigation hearing, September 17, 1984 and December 12, 1984;

h. A transcript of Karl LaGrand's confession to Detective Brackman;

i. A transcript of the interview dated Friday, January 8, 1982 in the Emergency Room of St. Mary's Hospital;

j. Initial school intake report from Smith Middle School dated April 3, 1978 by Van Taylor;

k. A Missing Person Report from Sierra Vista Police Department dated September 10, 1973;

l. The psychiatric discharge evaluation for Karl LaGrand dated January 4, 1979 by John L. Schorsch, M.D.;

m. The transcript of an interview of Joseph N. Langlois, former (retired) probation officer of Karl LaGrand;

n. A psychological report by Mickey McMann, Ph.D. dated September 22, 1976;

o. The pre-sentencing report by Dr. Phillip Bolch;

p. The transcript of an interview by the Pima County Public Defender with Dr. John Lewis, Kathy Baker;

q. Transcripts of interviews with Dawn Marie Lopez.

r. The transcript of an interview with petitioner's mother.

In addition to a through review of the records cited above, I met with Mr. Karl LaGrand in three sessions conducted over two consecutive days at the Arizona State Penitentiary in Florence, Arizona (December 12 and 13, 1992). These sessions consisted of a clinical interview and psychological testing for a total contact time of 10 hours. The psychological assessment instruments administered included the following: Portions of the Hare Psychopathology Checklist - Revised, the Checklist for Child Abuse Evaluation, the Personality Assessment Inventory (PAI), the Kaufman Brief Intelligence Test, the Thematic Apperception Test (TAT), the Rorschach Inkblot Test, the Multiscore Depression Inventory and the Beck Depression Inventory.

My opinions, and reasons for these opinions, relative to Karl LaGrand's family, early developmental history, psychosocial development, abusive experiences, psychological trauma, explosive behavior patterns and criminal intent during the events of January 7, 1982, as I have developed them in examining this case, are offered below.

OPINION: KARL LAGRAND WAS SUBJECTED TO NUMEROUS EXPERIENCES OF NEGLECT, VERBAL ABUSE, EMOTIONAL DEPRIVATION, PARENTAL INDIFFERENCE AND APATHY, AND PSYCHOLOGICAL ABUSE AS HE WAS GROWING UP.

The reason for this opinion are as follows:

The records, reports and transcripts that I reviewed from teachers and professionals who knew the family, in addition to my interview with Karl LaGrand, provide many details of the LaGrand household and instances in Karl's childhood and development in which significant emotional deprivation, neglect, physical abuse and psychological trauma in the form of anxiety, fear, panic and isolation were prominent. For example, when he was a toddler, Karl was separated from his mother for approximately two years while he lived in a German orphanage run by nuns. Mrs. LaGrand remembers that this placement was harsh for Karl and his brother. They did not get very good care. In one interview transcript, Emma LaGrand spoke of this orphanage and recalled, "the kids were playing in dirt and a few of them got sick and kids got lice. They had to shave their hair." She indicated that Karl and his brother were more withdrawn after that experience. She said, "They were telling a story, how the nuns don't gave them nothing to eat and then punished them and then talk like that. All the kids in the room and cold."

During these early years, Karl also spent approximately one year living with his grandmother because his mother worked during the day and at night. It was after the grandmother became ill that Karl was sent to the orphanage.

Emma LaGrand married Massie Lee LaGrand in 1967 when Karl was approximately 4 years old. Soon after, the family left Germany and came to the United States. Mr. LaGrand adopted the three children, all of whom were born out of wedlock, each of a different father. The family moves many times due to Mr. LaGrand's transfers in the military, going from Texas to Arizona back to Germany, back to the United States to Alabama and back to Arizona. Emma and Massie LaGrand divorced in 1975 when Karl was approximately 12 years old.

During this troubled marriage (when Karl was between the ages of four and twelve), alcoholism and violent behavior were commonplace in the LaGrand home. The family environment was disorganized and unstable. The parents were not involved in parenting the children, except for their attempts to use abusive punishments to manage their behavior. They did not lead or guide the children, they did not become voluntarily involved in school assistance. This pattern continued even much later in Karl's life when he was placed at a treatment program, Vision Quest, as an adolescent in need of supervision. The reports indicate that Emma LaGrand was not cooperative with treatment and showed no interest in assisting Karl: "Karl's mother's attitude is totally negative toward Karl and Vision Quest. She wants no contact with either and has no desire to participate."

The children were often left to fend for themselves. There was very little in the way of nurturance or guidance. Karl recalled during the clinical interview: "There was a lack of communication and expression. Not any openness. People didn't talk about things (like) what were your feelings or problems." Asked what he did with them, he said, "Kept to myself". Asked what would happen if he brought them up, he replied, "I don't know. I think I didn't know how. When I had problems...I got an ass-whipping for problems in school. I'd never say anything about it. I don't think we were taught to express yourself and we could work it out, that it was OK to express yourself. We were never taught that. There was never any time for just sitting, to take time to talk. It never happened in our family."

Joseph Langlois, a retired 22-year veteran probation office with Cochise County Juvenile Probation Department who worked with Karl, said about the LaGrand family, "It was a no win situation, even when they were like 9 and 10 years old...They didn't have no food in the home. Mama wasn't treating them right."

At the very young age of six, Karl was doing things more commonly done by older, troubled teenaged youth. Mrs. LaGrand herself recalled, "When they go into the first grade, they start running off." Karl remembered beginning to drink hard liquor fairly regularly at age eight or nine, and having a severe alcohol problem (e.g., drinking to the point of blacking out) by age 12. Joe Langlois: "The obvious solution (for Karl) was to leave home, 9 years old leaving home. And that tells you a lot about the kid."

Asked how he thought the lack of guidance and adult supervision might have affected him, Karl responded, "Probably in making decisions and opening up to people. Discussing. Instead of opening up, asking for advice or opinions, I would just blindly go ahead and make decisions on my own and not know what the end result would be. Even when I did get advice, I couldn't trust it or listen or ask for advice. (That was true by age 8 or 9 according to Karl.) Never had someone come freely to help. You get skeptical. Like 'why are they doing that?' You pull back and stay away. I would just jump into something without giving it any forethought." (Did that get you into trouble?) "Yeah." (Like the bank?) "I knew what I wanted. I definitely didn't give it enough forethought."

This is contemporaneous affirmation of the fact that Karl never developed the capacity and ability to confront unpleasant or conflicting situations. He simply was not shown how by his parents. Indeed he avoided them by running away or just reacting.

Evaluations and reports pertaining to Karl and his family further substantiate this profile.

a. A learning disabilities record prepared by Maxine L. McIntosh when Karl was in the fourth grade speaks to the emotional deprivation in the family: "Karl is a very volatile child. He comes from a home depravation of human associations and a lack of support and stability...I can only foresee a bleak situation for this little boy - what a shame - he needs love and attention so badly."

b. Another report by (Mrs.) Lou Allen, social services worker for the Arizona Department of Economic Security, dated December 16, 1975, states, "Mrs. LaGrand is serious with little levity in her life...Mrs. LaGrand has structured her entire life on a monetary base. She expends her total energies on financial matters, leaving no time to meet the emotional needs of her children...Mrs. LaGrand, I am confident, could never understand the need for an occasional hug or kiss..."

c. In a psychiatric discharge evaluation by John L. Schorsch, M.D. of Vision Quest, it was Dr. Schorsch's opinion of the LaGrand family that, "Karl comes from a very neglectful, at times severely emotionally and physically abusive family."

d. A psychological report by Psychologist Jean F. Chambers, Ph.D. from April, 1978, likewise states

> that "Karl seems to feel rejected and unloved and has a pretty miserable life to date." Dr. Chambers also recommended counseling in her report because, "Karl has been rejected and abused most of his life."

Both LaGrand parents had drinking problems, Massie LaGrand had a significant problem with alcohol, the severity of Emma LaGrand's alcoholism is minimized by Karl, although he stated, "There were times when she would have a glass of scotch during the day." Karl claimed he could not recall his mother drinking alcohol to the point of drunkenness. However, he did recall her being "tipsy". He saw his stepfather drunk many times. When Massie LaGrand drank, Karl remembered him as being "loud, stumbling, and aggressive. Getting into arguments with mom or with us. Then he would hit."

Karl described seeing his mother being battered by Mr. LaGrand saying, "It wasn't like a beating, but he hit her a couple of times with open and closed fists." Asked if he, Karl, tried to stop the violence, Karl answered that he tried to holler to stop it, but that was all he could do. Regarding Massie LaGrand, Joseph Langlois offered the opinion: "I think both boys were real fearful of their father or the stepfather in this case."

In addition to being abusive to Emma LaGrand, Massie LaGrand was often severely physically abusive to Karl and his brother. In recounting her husband's abusive treatment of the boys, Mrs. LaGrand stated that he beat both of the boys, "sometimes he beat them really hard and I had to go in between it...He took his belt off, and he was so mad sometimes...like one time, I don't know, they called me from work and Walter, Karl's brother, was bleeding in the head."

Karl said of his father, "He whipped me pretty bad...He would punch me and my brother. He had big graduation rings and he would smack me in the chest and get the belt out. He would tell me to bend over. I tried to protect myself, so I got hit on the back and the legs. They were pretty serious whippings, to say the least. I was pretty scared of him." When asked how many times would he be hit, Karl replied, "I don't know. The more you tried to resist, the more you got it." Asked if he thought some of the Massie LaGrand's beatings were excessive, Karl replied, "As far as I was concerned, all his beatings were excessive. He would punch us."

A significant factor in Karl's delinquency was the beatings he took. Karl was caught in a cycle of misbehavoir, beatings, and further misbehavoir. Mrs. LaGrand remembered, "The more they runned off, the more he beat them, the more angry he got..." One Missing Person report from Sierra Vista Police Department, when Karl was not quite 10 years old, supports these claims. The police report states that the probable cause of absense was "discipline at home." Minor childhood transgressions, such as Karl's spilling a bucket of paint while helping his father were dealt with by beatings, as a means to disclipline and set limits.

These beatings were impulsive, excessively harsh, unprovoked and unpredictable. "Sometimes it would happen in anger on the spur of the moment," Karl stated. Asked if his mother ever beat him, Karl said, "Dad was more the disciplinarian. Mom slapped me once or twice across the chops, but not hard. She never had no control". Implements were often used in these beatings. These included such things as a belt, sword, angle iron, switches, and Massie LaGrand's fists with large "graduation rings" on several of the fingers.

"At the time I was living with my stepfather, Massie LaGrand. I knew I couldn't go home, because Dad was pretty rough." In this quote, Karl LaGrand is describing the sequence of events following a problem in the 4th grad. (described below). Karl told of how he wandered about the neighborhood that night after school, afraid to go home. He finally fell asleep in a culvert behind his house. It rained during the night and Karl attempted to return to school the next day in wet clothes "like it was a regular school day." The principal and teachers spotted him coming back to school and he was brought into the principal's office. They were concerned about him. The office personnel gave him hot milk and cookies. Karl remembers he was running a fever. I asked Karl if this kind of treatment was confusing to him at the time, and he acknowledged that it was, "I was confused because I didn't get an ass-whipping. I would have been whipped pretty bad, especially for something like that." Asked if he was ever able to defy his father and challenge his abusive behavior as he grew older, Karl answered, "No. If anything happened you'd run away."

Reports from teachers and professionals who evaluated Karl during the years 1973 to 1981, when Karl was between the ages of 9 and 18, continue to consistently indicate a family environment that was psychologically toxic to these youngsters. It was chaotic, unpredictable, poorly-managed, hostile and bitter.

The reports from the treatment programs in which Karl was involved as an adolescent have numerous references to his interest in stabilizing his family situation and being able to return home. He recognized the problems there, but consistently sought to make things better. A report from Vision Quest dated August, 1978 says, "No doubt that Mother's non-involvement affects him (Karl) deeply." Likewise, process notes from Youth Opportunity Unlimited (YOU) state that Mrs. LaGrand did not answer Karl's letters and Karl was worried whether Mother cared for him. During one period, Karl was discharged from the YOU program to return home. He stayed with his mother, but the experience failed and Karl was returned to another program, Vision Quest, in less than a year. It was not until much later in his life, when he was placed with a foster family, the Barstows, that Karl experienced a stable non-institutional environment. "The Barstows have had an effect on my life. They are the first real stable family."

OPINION: KARL LAGRAND WAS TRAUMATIZED BY THE ABUSE HE EXPERIENCED AS A CHILD GROWING UP IN THE LAGRAND FAMILY. THESE TRAUMATIC EXPERIENCES DECIMATED THE NORMAL COURSE OF HIS PSYCHOLOGICAL DEVELOPMENT AND RESULTED IN SERIOUS PSYCHOLOGICAL IMPAIRMENTS AND SYMPTOMS. THESE WERE DOCUMENTED THROUGHOUT HIS CHILDHOOD AND ADOLESCENCE BY PROFESSIONALS WHO ASSESSED HIM.

The reasons for this opinion are as follows:

The effects of being raised in such a family environment as the LaGrand family provided, are usually psychologically and emotionally devastating to a child. Attachment behavior is a cornerstone in psychological and social development and is primary in significance and importance. There is a fundamental requirement of healthy psychological development to feel safe and to make strong affectional bonds and attachments to parents or parent substitutes. Many forms of psychological and emotional distress, such as anxiety, depression, rage reactions, and isolation are also related to poor attachment and bonding experiences in infancy and early childhood.

The sense of safety and security provided by a stable attachment contributes to the psychological health of the individual. When a child cannot establish a perception of safety, has little or no supervision, fears for his safety at the hands of the parents, is belittled, punished, terrorized, has no sense of control over events in his life, the trauma of such experiences often arrests psychosocial development. The child's primary goal in such a circumstance is directed away from the usual developmental tasks of mastery, achievement, and social development, and becomes narrowed to avoidance of pain and harm. It is a common phenomenon among abused children and children from alcoholic families that they maintain their chronic anxiety, depression, low-self esteem, and vigilance to signs of impending danger. Very often such children feel different and "bad" and become isolated from their peers and community. The world is too threatening, every situation is potentially dangerous because rage is unpredictable and unrelated to real events and behavior. Human emotionality becomes fused with rage and abuse. These effects commonly carry on into adulthood.

The effects of abusive traumatic experiences in childhood are often compared to post-traumatic stress disorder as it is experienced by victims of violet crime, war veterans, etc. Such severe trauma frequently results in a chronic state of feeling overwhelmed. Psychological trauma such as this frequently causes an individual to be vulnerable to intense emotion and often intolerant of social irritants, stress, anxiety, sudden surprises and the like.

In the wake of such trauma are symptoms of depression, anxiety and hypervigilance. Hypervigilance refers to the need to be constantly on the look out for danger, even in non-threatening situations. These are common psychological symptoms among adults and children abused in childhood. These individuals remain alert, ready, "on edge" and responsive to the slightest hint of danger. Other common symptoms include seeing things as being worse than they really are, and a loss of objectivity and distance from problems. Trauma victims often develop compulsive patterns in which they repeat behaviors over and over, with virtually no learning, in a failed attempt to gain a sense of mastery of their experience.

There are similar issues with reference to the psychological symptoms of adult children of alcoholics. Families in which alcoholism is prominent are marked by chaos and unpredictability. Due to the disinhibiting affects of the alcohol, physical violence in an uncertain, changing and unpredictable environment is common.

As a result, children grow up with an impaired ability to trust and feel safe. Because of the unpredictability of explosive violent outbursts in physically abusive and alcoholic families, the children who grow up in such families are often extremely sensitive to emotional agitation, particularly antecedent to anger, and monitor for signs that emotions are getting out of control. This chronic distortion and disturbed perception of the environment, means that strong emotions and conflict are virtually intolerable. Chronic feelings of vulnerability and intimidation perpetuate the experience of victimization. Under intense and emotionally stressful conditions the traumatic experiences are rekindled and panic quickly overwhelms the individual. Frequently, even mild verbal expressions of annoyance are perceived as a threat.

As has been previously suggested in several of the reports cited above, many professional evaluations I reviewed identified significant problems Karl had expressing his anger. The pre-sentence report dated May 23, 1985 quoted Dr. Philip Bolch (Balch), a psychologist, as stating, "Karl lacks adequate ways of expressing his anger." Dr. Bolch also stated that Karl seems to be overwhelmed with stress at times and that this impairs his ability to function.

Quotations from the reports mentioned previously in this affidavit, identify the same issues. Frequently, statements are made stating that Karl has a "low threshold for anxiety and tends to overreact to problems", that "he is an insecure and anxious boy, has poor self concept and little confidence in himself." "He is particularly afraid of angry, hostile acts, both real and imaginary." "He is easily overwhelmed by anxiety which disrupts organized thinking and definitely interferes with academic and intellectual tasks." The MMPI from 1978 suggests Karl having a low threshold for anxiety and a tendency to overreact to problems, also that he doesn't posses very good coping mechanisms.

Throughout Karl's formative life, often evident in psychological reports, are seen the psychological symptoms and traits of a dysfunctional family background. The reports I reviewed indicated the following:

a. A psychological report by Jean F. Chambers, Ph.D. from April 1978 (Age 14) describes Karl as being chronically tense and anxious, having a low threshold for anxiety and a tending to overact to problems. Her diagnosis is "severely emotionally handicapped."

b. Dr. Schorsch, cited above in his psychiatric discharge evaluation of January, 1979 (Age 16) states that his diagnostic impression is "Depression improved." Dr. Schorsch states that Karl, "exaggerates and overdetermined his past behavior and tends to blame himself for his separation from his family...he (Karl) carries a lot of internal guilt for his behavior and has difficulty working through his angry and perhaps sad feelings toward the rejection toward his family and blaming himself."

c. A psychological report by Micky McMahon, Ph.D. of September, 1976 (Age 11-12) states that, "Karl is an insecure and anxious boy, he has poor self concept and little confidence in himself." "He is particularly afraid of angry, hostile acts both real and imaginary." "He is easily overwhelmed by anxiety which disrupts organized thinking and definitely interfere with academic and intellectual tasks."

d. In the pre-sentence report for the crime of armed robbery and kidnapping, relied on an arlier psychological evaluation by Dr. Phillip Bolch which states that Karl "tends not to adequately anticipate the consequences of his actions" and "seems to become overwhelmed with stress at times and at those times, his ability to function becomes quite impaired...the defendant appears to have been reared in a highly unstable home environment which was marked by parental marital difficulties, lack of parental displays of affection and concern, and the absence of appropriate role models and discipline." Later in the pre-sentencing report it is stated, "the defendant developed a severe emotional handicap suffering from rejection, depression and loneliness...the defendant may be desperate what he perceives to be an intolerable situation (his unstable life), however, he may become frustrated by his inability to do so, resulting in his involvement in criminal activity."

The results of my psychological evaluation conducted with Karl last December continue to demonstrate the presence of significant levels of depression and anxiety caused by the dysfunctional and abusive family environment.

Karl's self esteem is quite low and he regards himself poorly. He remains socially introverted, pessimistic and feels helpless about his situation and the events of his life. Standard measures of depression such as the Beck Depression Inventory and the Multiscore Depression Inventory and the Depressions Subscale of the Personality Assessment Inventory (PAI) consistently indicate severe levels of depression. For example, the Multiscore Depression Inventory has a mean of 50T which a standard deviation of 10. Karl's total T score from depression was 90T, 4 standard deviations above the mean, indicating that he is in the upper 99th percentile in reporting depressive symptoms when compared to the general population. Similarly, Karl's depression subscore on the Personality Assessment Inventory was also 90T.

The psychological testing also indicated that Karl does not experience support from others and finds that others disappoint him or are not available to him. In addition, the world through Karl's eyes is hostile, depressing and indifferent. Karl feels isolated and out of touch with others. He experiences himself as being alienated and poorly understood. The evaluation, which are common psychological experiences to individuals who have been abused as children, indicated that Karl is not a reckless person, that he does not take needless risks nor does he put himself and others in danger. He avoids strong emotion and tries to remain calm. Karl's typical manner of dealing with frustrating or threatening situations is to remain stoic and outwardly unemotional. He does not freely express his hostility or anger nor does he make threats.

Karl's impulsivity, as a trait of his character, is demonstrated by his lack of control over his aggressive behavior when under extreme stress. He tends not to present with an angry attitude nor does he seem to be easily provoked by others. He demonstrates little insight into his own motivation and psychology. Karl is very submissive in social interactions and frequently subordinates his interest to those of others. He is prone to be mistreated and exploited by others.

Neither the current clinical interview nor information garnered from previous reports and interviews suggest a glib or insincere charm as would be indicative of a psychopathic personality. There is no evidence to suggest that Karl is overtly manipulative or conning. He does not use family members for money or personal gain, nor does he see others in terms of predator and prey. Karl is neither callous nor cynical and selfish.

With regard to a sense of remorse, there is no evidence to suggest that Karl harbors contempt for others. As he retold the events of the robbery and murder of January 7, 1982, Karl became upset. He tried to hide his face with his hands. When he put his hand down from his face, he was tearful and distraught. He didn't say anything at the time. Later in the interview we went back to that moment and I asked Karl what he was thinking at the time. He said, "I don't know. I feel hurt for doing that. Every so often I think about it and feel those feelings. I did not want to hurt anyone, much less kill them." During another period in our interviews, near the conclusion, Karl commented, "I never beat up on a woman. Usually I enjoy conversations with women, but can't without feeling guilty about what happened with Dawn. I refrain (sic) myself. I just don't feel good about myself. No pleasure or joy. I look at myself; it reminds me of what happened. It makes me feel fucked up. How could I have done that to that man and woman?"

He has a positive history for early behavior problems including fire setting, truancy, robbery, theft, substance abuse, vandalism, and running away from home. The majority of Karl's crime and arrest record are for violations against property (vandalism, burglary, shoplifting, etc.) rather than persons.

Karl LaGrand's intellectual functioning falls in the average range, however, there remains a discrepancy between verbal and non-verbal problem solving such that verbal intelligence is significantly higher than non-verbal reasoning abilities.

Therefore, the documentation and contemporaneous evidence substantiate serious psychological impairment by the traumatic experiences of growing up in this environment.

OPINION: AS A RESULT OF BEING A VICTIM OF VIOLENCE HIMSELF, KARL LAGRAND FINDS HIS OWN VIOLENCE UNACCEPTABLE AND IT IS KEPT FROM CONSCIOUS AWARENESS. WHEN KARL LAGRAND EXPLODES INTO A VIOLENT RAGE HE CANNOT IDENTIFY THE ANTECEDENT CONDITIONS, NOR CAN HE PREDICT ITS OCCURRENCE, NOR DOES HE EXERT CONSCIOUS VOLITION OVER HIS ACTIONS. IT IS A RESPONSE THAT IS SEPARATE FROM HIS CONSCIOUS EXPERIENCE OF HIMSELF.

The reasons for this opinion are as follows:

My impression of the young Karl LaGrand from the records, reports and transcripts of testimony from those who knew him as a youngster, is he was an individual who responded well to environments which were predictable and caring. Teachers, counselors, probation officers, etc. who worked with Karl tended to like and trust him. Reports suggest a genuineness and trustworthiness about his character. The reports do not present him as an intractably oppositional or defiant youngster.

a. Karl's probation officer, Joseph Langlois, a probation officer for 22 years stated, "I trusted Karl." "I liked Karl an awful lot." Mr. Langlois describes Karl as a young man who could be controlled. Recollecting his experiences with Karl he stated, "Karl was more of a pacifist sort of." "I have never known Karl to even get involved in a fight."

b. An intake report for Vision Quest states, "Karl on the other hand seems very committed to receiving help and has been completely cooperative during his brief stay at Vision Quest... He shows signs of being a leader in the group home and is looking forward to some stability in his life."

c. Dr. Schorsch, Karl's psychiatrist at Vision Quest reported, "Karl has done exceedingly well...he was totally involved in the Vision Quest program including individual and group therapy...his relationships with his peers has markedly improved and he is well liked and respected."

d. The psychological report by Richard Dymeck, certified school psychologist indicates that Karl's response to group and individual treatment at YOU, "Reports from these therapy sessions indicated Karl has made excellent progress." This report further states that, "Despite the fact that Karl was targeted to go swimming in the afternoon (of the evaluation), he maintained a cooperative attitude with the psychologist and made every effort to do his best...he was extremely polite, prefacing his request with 'would you please'."

e. Dr. Jean Chambers' psychological report states that the results of the Jessness Inventory do not suggest delinquent proneness.

According to Karl, Weaver Barkman, one of the detectives who had interrogated him at the time of his arrest, testified that he thought Karl liked to kill. Karl took great exception to that statement. He said, "I'm not a killer. I went on a deer hunting trip with my foster father and one of his friends. Him, and a buddy and me. We had rifles. There's plenty of times I could have shot deer, but I didn't want to...I saw 2 or 3, but I let them go right past me. It's against everything that (I) stood for. Never abuse an animal."

During my clinical interviews with Karl, I asked about his anger. He said, "I don't get mad that easy. It takes a lot. When I do, people tend to move away." He said that if someone keeps putting pressure on him, and keeps badgering him, he doesn't get mad, "I just get tired of it. Basically, I let them know. I don't say it verbally, like I tell someone, 'Look I'm mad'."

Over the course of my three interviews with Karl, he told of three episodes in his life in which he became violent without premeditation. These stories were not told one after the other as they appear here, but rather were jogged from memory from time to time as we spoke of different subjects and times in his life. The common pattern in each of these accounts is the lack of emotion, the explosive and violence that took place, the lack of premeditation, threats, or warnings, the dissociative experience in which Karl LaGrand described his own reaction as unreal, being shocked, unaware, and surprised by his own actions. The stories are presented in chronological order as they relate to Karl's life from youngest to eldest.

Principal paddle story In the first account Karl describes being in elementary school in the 3rd and 4th grade. He became frustrated dong his work and threw his paper off the desk. The teacher asked "who do you think you are?" Karl answered, "Mr. Big Stuff" which was the title of a popular song at the time. The class laughed. The teacher took Karl to the principal's office. The principal took out a paddle. Karl remembers, "The secretary tried to hold me so I kicked her in the ankle and hurt her. The principal was getting ready to swing his paddle. I was pretty determined not to get hit. From what I was told. I attacked him and ran. I don't recall specifically, maybe I pushed him."

T-Square story: A second story was prompted when Karl was asked if he had ever been suspended from school, he said that he had and told the following story. "In junior high school I racked a guy with a T-Square in our drafting class. The guy was messing with me. I wasn't really mad I just went and did it. It was a dumb thing to do. The T-Square was hard plastic. The guy was pestering me all day. I don't recall what it was about. I was putting some stuff away and just out of the blue I put it between his legs and pulled up. And he went out." Asked what he was thinking before this happened, if he was angry, or had planned what he was going to do, he replied, "No, I didn't even respond. I didn't get mad or emotional. I just got tired of listening to it, and out of the blue just did it." Afterwards, the whole thing seemed like it was in slow motion. I guess I was even shocked I did it." Asked what he meant, Karl continued, "Shocked I even did the act. That's pretty stupid 'cuz I know how that hurts...it was like a flashback. I didn't know I was going to do it until it was done. I saw myself doing it, but didn't know it until the act happened. In other words, it wasn't like I was saying I'm going to go over and rack this guy like this."

JR and the Boxcutter story: The third story was disclosed in response to an inquiry his response of VERY TRUE when asked "Sometimes my temper explodes and I completely lose control." There a peer, Junior, who lived in the Barstow family's foster home with Karl. Karl and this boy were friends, in a manner of speaking. Karl remembered, "They called him 'J-R'. He would always ride me." When asked what JR would say, Karl replied, "I don't recall. I went overboard. I was determined and I went after him with a boxcutter. I didn't care about anything. I was running all over the place with the boxcutter in my hand (chasing JR) when the staff tackled me. It didn't even phase me. They couldn't even pry it out of my hand, I was so intense. That's the intensity of what goes off inside me. It's rare, but that's an example of what's inside me. Asked if he cut JR he said, "No, he was too fast. Glad I didn't. If I did catch him, I would have cut him." Asked what his sense of the episode was afterward, he responded, "I don't know. It was like looking at a whole different person. It couldn't have been me. If I can, I try to avoid any kind of confrontation or conflict." When asked if he was friends with JR after the incident, Karl said, "Yeah. He didn't mess with me, though. He was shocked. Me too."

There is striking consistency between my interviews with Karl nearly 11 years after the offense and the transcripts of the interrogation, confession and statements made in 1982. Also, the dissociative experiences Karl described when he became explosively violent as a youth, are remarkably similar to the incident of January 7, 1982. In the transcripts of the interrogation by Weaver Barkman, Karl states, "I wasn't me, goddamit it." Throughout the interrogation and at other times, Karl states clearly, "I didn't mean to do it." It is following this description that Karl says, "I wasn't me."

OPINION: KARL LAGRAND MADE HIS BEST EFFORT TO MINIMIZE THE LIKELIHOOD THAT ANYONE WOULD BE HARMED IN THE COMMISSION OF THIS ROBBERY.

The reasons for this opinion are as follows:

Regarding the violence committed in the commission of the bank robbery, Karl LaGrand has asserted from his earliest testimony immediately after his arrest, that he did not intend to harm anyone when he entered the bank. "I did everything I thought was necessary, that no one would get hurt, whether in the bank, myself, or my brother. That was the main goal. Other than getting the money and getting away. I'm no killer. 'Cuz I knew if I brought a real gun, someone would get killed, and no way was I going to take that chance."

The following is a compilation of steps and assumptions Karl LaGrand relied upon to minimize the risk of violence or harm:

a. He used a toy gun in the commission of the bank robbery. Asked why he chose a toy gun, Karl replied, "It was a bluff..." "I figured there was no need for a gun." "Only show a gun and there would be no problem." "The gun was a threat." I had a fake gun because I wanted to make sure no one got hurt."

b. His plan was to be convincing from the onset to minimize challenges. "I just figured if I was verbally convincing, they were not going to challenge me." "I did not take a weapon. I used finesse and bullshit to convince." (Why not take a real gun and bluff with that?) "I could have, but I felt no need for a real gun. I just needed to be convincing - and we were." "The bottom line, I didn't want anyone to get hurt. No weapons."

c. He reasoned that no one would fight for money that wasn't theirs and was insured. "I figured no one in his or her right mind is going to put their lives on the line for money that is not theirs. It's insured anyway."

d. He reasoned that if the bank employees realized they were in no danger, they would be much less inclined to confront or attack him or his brother.

e. They would be in and out of the bank quickly. "The bank was small and shouldn't be no trouble."

f. He tried to calm people when they appeared to panic to keep the situation in control. To his recollection, Karl says that he continued to say to Dawn, "Don't worry, calm down. We're going to leave. We're not going to hurt you. He added that during the robbery, "I was trying to maintain my calm. I didn't want my voice to be threatening."

g. Regarding the threats that were made, Karl stated, "Walter told him (Ken) if you don't get it" (the combination to the safe), he would be harmed. Karl demonstrated Walter putting a letter opener under Ken's chin.

OPINION: AS THE ROBBERY BEGAN TO FAIL, KARL LAGRAND RECOGNIZED THAT THE BANK EMPLOYEES WERE BECOMING AFRAID AND FEARING FOR THEIR LIVES. THIS WAS AN IMPORTANT AND SERIOUS TURN OF EVENTS IN KARL'S MIND. AT THIS JUNCTURE KARL, HIMSELF, BEGAN TO FEEL THREATENED AND PANICKED. WHAT FOLLOWED WAS UNEXPECTED GIVEN HIS EARLIER SAFEGUARDS AND OPPOSITE HIS CONSCIOUS INTENT.

The reasons for this opinion are as follows:

In describing the events that took place in the bank as the situation deteriorated, Karl descried his internal state saying, "I wasn't really calm. I was getting panicky, too...because of her (Dawn) making noise and shit." When I asked if he felt in danger, Karl responded, "I was scared. I don't know if danger, nothing in particular, just the whole thing. I just wanted to get out."

He recalled, "When he (Ken Hertsog) kicked, that was serious. In my mind it's not like I said, 'Oh, he kicked me'. In my minds' eye this guy's on top of me and I got to react."

In the transcript of the interrogation by Weaver Barkman, done shortly after the murder, Karl states, "He (Ken) kicked me in my left leg and I panicked." "She (Dawn) started screaming more and he started to try to kick more and I panicked and stabbed him." "She was screaming and hollering more and I stabbed her, I didn't want to do it, man, I panicked, they panicked." (Did you sense things coming to a peak in the bank?) "Not necessarily that it would explode like it did. I was just concentrating on calming her (Dawn), not thinking about anything else. The situation was not going our way. Frustration, tension, but not to the point that it would boil over to the point that it did. That was beyond anything I could imagine."

OPINION: AFTER REVIEWING THE COMPLETE TRANSCRIPTS OF THE SENTENCING HEARING OF SEPTEMBER 17, 1984 AND DECEMBER 12, 1984, IT IS MY OPINION THAT THE DETAILS OF THE MANY FORMS OF PSYCHOLOGICAL AND EMOTIONAL DISTRESS, INCLUDING KARL'S CHILDHOOD AND SDOLESCENSE, KARL'S DEPRESSION, HYPERVIGILANCE AND GENERAL PARANOIA, tHE DETAILS ARE INCOMPLETE.; THEREFORE, THE COURT WAS AT A DISADVANTAGE WITHOUT THIS IMPORTANT INFORMATION BEING UNDERREPRESENTED.

CONCLUSIONS:

1. Karl LaGrand's childhood was characterized by the traumatizing reality of verbal and physical abuse, emotional deprivation and parental indifference and apathy.

2. As a result of this family environment, Karl LaGrand's psychological development was ravaged and resulted in serious psychological impairments that are documented.

3. Karl LaGrand explodes into a violent rage of which he cannot identify the antecedent condition, nor can he predict its occurrence, nor does he exert conscious volition over his explosive rage reactions.

4. The murder was mitigated by Karl Lagrand's efforts to minimize the likelihood that anyone would be harmed in the

commission of the robbery.

5. The violence that occurred was unanticipated and opposite Karl LaGrand's conscious intent.

6. As a result of the circmstances which developed in the bank, including, the telephone call form the other bank employee, the need for a second combination, the unconsolable hysterical reaction by Ms. Lopez, Karl's recognition of the bank employees desperation and fear, Karl's volitional control was overwhelmed by panic.

7. Karl LaGrand does not have the ability to anticipate or control his violent reactions in stressful circumstances.

8. Karl LaGrand has fragile coping mechanisms, which fail under conditions of stress in highly charged emotional situations.

9. In order to develope and complete a thorough clinical evaluation of this type, it was necessary for me to meet with Karl LaGrand for ten contact hours over three sessions. It is my opinion that this is customary.

10. For Karl LaGrand, the events which preceded the stabbing in the manager's office exacerbated a defiecency in his psychological functioning, especially with regard to maining control of primitive impusles and under severe stress. this significantly impaired his ability to form a specific rational intent to harm, making this reaction in this circumstance beyond his volition and control.

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Further your affiant sayeth not.

Dated this 5th day of March, 1993.

PhD MSEd

Timothy J. Derning, Ph.D., M.S.Ed.
Licensed Clinical Psychologist

STATE OF CALIFORNIA)
) ss.
COUNTY OF ______)

On ______________ before me, ______________, a Notary Public in and for said State, personally appeared, Timothy J. Derning, Ph.D., M.S.Ed., personally know to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument, and acknow

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California
County of Contra Costa

On 3/5/93 before me, Sherry Bennett, notary public
DATE — NAME, TITLE OF OFFICER - E.G., "JANE DOE, NOTARY PUBLIC"

personally appeared Timothy J. Derning.
NAME(S) OF SIGNER(S)

☐ personally known to me - OR - ☒ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

OFFICIAL SEAL
SHERRY BENNETT
NOTARY PUBLIC CALIFORNIA
CONTRA COSTA COUNTY
My Comm. Expires June 9, 1993

WITNESS my hand and official seal.

Sherry Bennett
SIGNATURE OF NOTARY

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Licensed Clinical Psych

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Annex MG 47

CIRCULAR ORDER (RUNDERLAß)
ON ASSISTANCE FOR GERMANS DETAINED ABROAD
(15 OCTOBER 1998)

AUSWÄRTIGES AMT
Gz.: 511-531.45 Bonn, 15. Oktober 1998

An alle
diplomatischen und berufskonsularischen Vertretungen

Betr.: **Beistand für Untersuchungs- und Strafgefangene im Ausland**
Bezug: 1) Runderlaß 511-531.45 vom 26.10.1992 - RES 53/6 -
2) Runderlaß ASMR 320.21 vom 29.05.1998
Anlg.: - 2 -

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I.

1. Die Beschränkung der persönlichen Freiheit durch Verhaftung ist ein besonders schwerwiegender Eingriff in die Individualsphäre. Eine Verhaftung im Ausland wird in der Regel im Vergleich zum Inland zusätzliche Belastungen für die Betroffenen mit sich bringen, z.B. durch Verständigungsschwierigkeiten, ein fremdes Gesellschafts- und Rechtssystem und Unkenntnis der sonstigen örtlichen Bedingungen.

Der schnellen, sachgerechten und umfassenden Betreuung inhaftierter Deutscher durch die Auslandsvertretungen kommt daher besondere Bedeutung zu. Dies gilt unabhängig davon, aus welchen Gründen eine Inhaftierung erfolgt ist.

Die deutsche Öffentlichkeit wurde mit der im Frühjahr 1998 auch an die Auslandsvertretungen versandten Broschüre „Unser Konsulardienst - Hilfe und Service für den Bürger weltweit" über die von den Auslandsvertretungen geleistete Hilfe für inhaftierte Deutsche unterrichtet. Zu Recht erwartet der Bürger, daß die Auslandsvertretungen denjenigen Deutschen, die sich unter oft sehr schwierigen Bedingungen in Haft befinden, engagiert und einfühlsam konsularische Hilfe leisten.

2. Das am 15. Dezember 1974 in Kraft getretene Gesetz über die Konsularbeamten, ihre Aufgaben und Befugnisse (Konsulargesetz) enthält in § 7 KG eine besondere Bestimmung über die Pflicht der Auslandsvertretungen, deutsche Untersuchungs- und Strafgefangene zu betreuen.

Die Verpflichtung zur Gewährung von Rechtsschutz im Sinne von § 7 KG steht in engem Sachzusammenhang unter anderem mit der Konvention zum Schutz der Menschenrechte und Grundfreiheiten vom 4. November 1950 (BGBl. 1952 II, 685) und dem WÜK (BGBl. 1963 II, 1585), insbesondere Art. 5, Buchst. e und Art. 36.

Für die Beurteilung der Behandlung von Verhafteten und der Haftbedingungen sind folgende Rechtsgrundlagen von besonderer Bedeutung:

- Internationaler Pakt vom 19.12.1966 über bürgerliche und politische Rechte (BGBl 1973 II 1533), insbesondere Art. 6-16,
- Übereinkommen vom 10.12.1984 gegen Folter und andere grausame, unmenschliche oder erniedrigende Behandlung oder Strafe (BGBl 1990 II 246); das Folterverbot gilt als Grundsatz des allgemeinen Völkerrechts auch für Nichtvertragsstaaten dieses Übereinkommens,
- Übereinkommen über die Rechte des Kindes vom 20.11.1989 (BGBl 1992 II 121) insbesondere Artikel 37 und 40,
- ggf. die europäische Konvention zum Schutze der Menschen und Grundfreiheiten vom 04.11.1950 (BGBl 1952 II 685, 953), insbesondere Art. 5-7 und Europäisches

Übereinkommen vom 26.11.1987 zur Verhütung von Folter und unmenschlicher oder erniedrigender Behandlung oder Strafe (BGBl 1989 II 946),

- Mindestgrundsätze der Vereinten Nationen für die Behandlung von Gefangenen (Entschließung des Wirtschafts- und Sozialrates der Vereinten Nationen 663 C I (XXIV) vom 31.07.1957). (Anlage 1),
- ggf. Europäische Strafvollzugsgrundsätze (Empfehlung der Ministerkomitees des Europarates R (87) 3 vom 12.02.1987). (Anlage 2)

II.

Eine Übersicht über die Maßnahmen, die aufgrund der §§ 1, 5 und 7 Konsulargesetz im einzelnen zu treffen sind, muß notgedrungen unvollständig bleiben, da die Verhältnisse in den Gastländern zu sehr voneinander abweichen. Für die meisten Länder dürfte jedoch vor allem folgendes von Bedeutung sein:

1. Die Pflicht zur Gefangenenbetreuung wird in §7 KG ausdrücklich von einem entsprechenden Verlangen der Gefangenen abhängig gemacht. Gleichwohl sollten die Auslandsvertretungen unabhängig von einem solchen Verlangen zunächst mit allen Deutschen Kontakt aufnehmen, von deren Verhaftung sie erfahren. Dies entspricht der allgemeinen Beistandspflicht gemäß §§ 1 und 5 (1) KG, denen gegenüber § 7 KG nicht als Spezialvorschrift mit Ausschließlichkeitscharakter, sondern als ergänzende Vorschrift betrachtet werden muß. Ohne eine solche zunächst von Amts wegen erfolgende Kontaktnahme würden deutsche Untersuchungs- oder Strafgefangene oft überhaupt keine Möglichkeit erhalten, ein Verlangen im Sinne von § 7 KG zu äußern. Die erste Fühlungnahme mit deutschen Gefangenen stellt insofern noch keine Betreuung im Sinne von § 7 KG dar. Weitere Maßnahmen im Interesse der Gefangenen sind dagegen von einer entsprechenden Willensäußerung der Betroffenen abhängig.

2. a) Nach dem Wortlaut des § 7 KG besteht eine Betreuungspflicht gegenüber deutschen Untersuchungs- und Strafgefangene. Eine am Zweck der Norm ausgerichtete Auslegung gebietet die Betreuung auch der Personen, denen anderweitig die Freiheit entzogen wird (z.B. durch Zwangseinweisung in geschlossene Heilanstalten).

   b) Der Betreuungsanspruch deutsch-ausländischer Doppelstaater besteht unabhängig von der weiteren Staatsangehörigkeit des Deutschen. Allerdings kann nach allgemein anerkannten Regeln des Völkerrechts ein Mehrstaater von jedem Heimatstaat ausschließlich als eigener Staatsangehöriger in Anspruch genommen werden. Insofern kann die Betreuung durch den Gaststaat eingeschränkt werden, wenn der Doppelstaater auch die Staatsangehörigkeit des Gaststaates besitzt.

c) Art. 20 (ex 8c) EG-Vertrag in Verbindung mit den Ratsbeschlüssen vom 19.12.1995 erstrecken die Pflicht zum konsularischen Schutz auf Bürger der Europäischen Union, die im Gastland keine Vertretung haben (s. insbesondere RE 513-350.36 vom 24.01.1996 sowie RE 502-350.34/1 Sbd 1/510-350.10/6 vom 28.05.1993 und RE 513-350 vom 15.06.1993). Zusätzlich zu der auch für Deutsche gebotenen Betreuung ist der Heimatstaat des Inhaftierten zu unterrichten, entweder über die Hauptstadt des Heimatstaates des Inhaftierten oder die nächstgelegene Auslandsvertretung.

d) Mit der Gewährung von Asyl in Deutschland ist auch eine Obhutspflicht verbunden. Auch wenn keine Betreuungspflicht nach § 7 KG besteht, kann im Einzelfall ein Tätigwerden der Auslandsvertretung nötig werden. Auf die Belange des Gastlandes, insbesondere mögliche Einwände, ist Rücksicht zu nehmen. Die Unterrichtung des örtlichen UNHCR-Büros kann angezeigt sein; insbesondere bei Einwänden der Gastregierung sollten dessen Vertreter um Übernahme der Betreuung gebeten werden.

3. a) Die Auslandsvertretungen sollten grundsätzlich sicherstellen, daß sie von der Verhaftung von Deutschen in ihrem Amtsbezirk unverzüglich benachrichtigt werden. Zu einer solchen Benachrichtigung sind die Behörden des Gastlandes gemäß Art. 36 (1) b WÜK zumindest dann verpflichtet, wenn die Verhafteten es verlangen.

b) Die Behörden des Gastlandes sind gemäß Art. 36 (1) c WÜK verpflichtet, zumindest den mit konsularischem Status ausgestatteten Angehörigen der Auslandsvertretung den Besuch von Verhafteten zu gestatten. In Art. 36 (1) c WÜK kommt ein allgemeiner Grundsatz des Völkergewohnheitsrechts zum Ausdruck, der auch nicht dem WÜK beigetretene Staaten verpflichtet.

4. a) Sobald eine Auslandsvertretung von der Verhaftung deutscher Staatsangehöriger in ihrem Amtsbezirk erfährt, sollte sie sich bei den zuständigen Behörden des Gastlandes nach dem Grund der Verhaftung erkundigen und sobald wie möglich mit den Verhafteten selbst Kontakt aufnehmen. Dies kann geschehen

- indem Angehörige der Vertretung die Verhafteten besuchen,

- indem eine Vertrauensperson der Vertretung (z.B. ein Rechtsanwalt, ein Seelsorger oder ein Mitglied des Hilfsvereins) gebeten wird, Verhaftete zu besuchen,

- fernmündlich oder schriftlich.

b) Bei dem ersten Kontakt mit Verhafteten sollte insbesondere geklärt werden:

- genaue Personalien (u.a. Namen, Staatsangehörigkeiten, Ausweise, Heimatanschrift; Namen, Telefon und Anschrift der nächsten Angehörigen),
- ob sie eine Betreuung durch die Auslandsvertretung wünschen (s.o. Abschnitt II Ziffer 1)
- ob sie die Gründe der Verhaftung kennen,
- ob Dolmetscher erforderlich sind,
- ob sie korrekt behandelt werden, insbesondere ob die international anerkannten Mindeststandards eingehalten und sie gegenüber Staatsangehörigen des Gaststaates nicht diskriminiert werden.
- ob ihre Gesundheit beeinträchtigt und ob ggfs. eine ärztliche Behandlung gewährleistet und angemessen ist,
- ob Verpflegung sowie Versorgung mit Kleidung und hygienischen Artikeln ausreichend sind,
- ob und ggf. welche Angehörigen benachrichtigt werden sollen (bei festgenommenen Minderjährigen sind in jedem Fall die nächsten Angehörigen zu benachrichtigen),
- ob der Verhaftete bereits über einen Anwalt verfügt (Name, Anschrift) oder ob die Vermittlung eines Strafverteidigers erwünscht wird.

c) Die Vertretung vergewissert sich, daß der Verhaftete seine Rechte nach dem örtlichen Recht kennt. Die entsprechenden Informationen können in einem Merkblatt (s.u. Abschnitt II, Ziffer 10 a)) enthalten sein, das gleichzeitig erklärt, was die Vertretung für den Inhaftierten unternehmen kann. Bei Rechtsauskünften sollte darauf hingewiesen werden, daß sie als erste Orientierung dienen und eine ausführliche Rechtsberatung durch einen mit den Normen des Gastlandes vertrauten Anwalt nicht ersetzen können. Weiterhin erscheint es zweckmäßig, die Verhafteten darauf hinzuweisen, daß sie ggf. verpflichtet sind, Leistungen und Auslagen zu erstatten (vgl. Abschnitt IV, Ziffer 2).

d) Die Unterrichtung von Angehörigen soll grundsätzlich direkt durch die Vertretung oder per Fernschreiben über das BKA Wiesbaden mit der Bitte um Befassung der zuständigen örtlichen Polizeidienststelle erfolgen.
Eine regelmäßige Pflege der Kontakte zu Angehörigen kann angezeigt sein, z.B. wenn der Inhaftierte ernste gesundheitliche Probleme hat oder kein Verteidiger vorhanden ist, der sie über die Entwicklung des Verfahrens unterrichtet. Allerdings sollten auch die Angehörigen ausführlich über die Möglichkeiten und die Aufgaben der Vertretungen unterrichtet werden, da hier zuweilen falsche Vorstellungen bestehen.
Zum Schutz der Persönlichkeitsrechte der Inhaftierten sollten Anfragen zu Einzelheiten der Haftfälle grundsätzlich nur im einvernehmen mit den Betroffenen beantwortet werden.

e) Sofern andere Überweisungsmöglichkeiten ausscheiden, können Geldüberweisungen für Inhaftierte über die Legationskasse des Auswärtigen Amtes (Konto-Nr. 38001025 bei der Landeszentralbank Bonn, BLZ 380 000 00) erfolgen. Die Überweisung muß den Verwendungszweck (z.B. „Haftfall N.N.") und den Dienstort enthalten.

f) Die Vertrauensbasis zwischen der Botschaft und den länger Inhaftierten wird häufig durch kleine Betreuungsmaßnahmen wie das Mitbringen von Lesematerial und Dingen des Lebensbedarfes verbessert. Die besonderen Verhältnisse des Gastlandes können eine regelmäßige Unterstützung erforderlich machen.
Ist absehbar, daß der Inhaftierte über einen Zeitraum von zwei Monaten hinaus finanzielle Unterstützung für den zum Leben unbedingt notwendigen Bedarf benötigt, ist zu erwägen, ob ihm ein Antrag auf Sozialhilfe für Deutsche im Ausland nahegelegt werden sollte (s. RE 513-542.10 vom 18.01.1995 - RES 54/4, Ziffern 3.2.3, 4.3 und 5.4.1.4 sowie Dienstanweisung "Hilfe für Deutsche im Ausland" 513-542.15 vom 04.02.1994 - RES 54/30, Ziffern 2.9 und 5.5). Für eine notwendige finanzielle Unterstützung, die zwei Monate nicht überschreitet, sind Leistungen nach § 5 KG zu gewähren.

Auf die Möglichkeit einer kleinen finanziellen Zuwendung des Deutschen Roten Kreuzes zu Weihnachten für länger Inhaftierte in Mittel-, Ost- und Südosteuropa wird hingewiesen. Anträge sollten unter kurzer Schilderung des Falles von der Vertretung unmittelbar an das DRK gerichtet werden (Deutsches Rotes Kreuz, Suchdienst Hamburg, Postfach 306123, 20327 Hamburg).

5. Falls Verhaftete die Vermittlung eines Verteidigers wünschen, sind ihnen nach Möglichkeit geeignete und vertrauenswürdige Rechtsanwälte zu benennen. Hierbei ist darauf hinzuweisen, daß die Auslandsvertretungen keine Garantie für die Arbeit der Anwälte übernehmen können („ohne Gewähr") und ein Auftragsverhältnis nur zwischen Verhaftetem und Anwalt besteht.

Gegebenenfalls ist auch dafür Sorge zu tragen, daß für die Verständigung zwischen den Verhafteten und ihren Verteidigern ein Dolmetscher zur Verfügung steht.

Sofern die Verhafteten selbst oder ihre Angehörigen nicht auf Vermittlung eines Wahlverteidigers sowie evtl. auch eines freigewählten Dolmetschers Wert legen und die damit meist erforderlich werdenden Honorarvorschüsse leisten, ist nach Möglichkeit auf die Bestellung eines Pflichtverteidigers und evtl. auch den Einsatz eines vom Gastland bezahlten Dolmetschers hinzuwirken.

Nur subsidiär und vorbehaltlich der einzuholenden Zustimmung des Auswärtigen Amts kann für notwendige Rechtsschutzkosten eine Hilfe nach § 5 KG in Betracht kommen, falls die in RES 54/30 unter Ziffer 5.7 aufgeführten Voraussetzungen gegeben sind.

6. Die Teilnahme an Gerichtsterminen kann aufgrund der besonderen Verhältnisse im Gastland oder der Bedeutung des Falles geboten sein. An der Hauptverhandlung sollten Angehörige oder Beauftragte der zuständigen Auslandsvertretung nach Möglichkeit zumindest dann beobachtend teilnehmen, wenn zu befürchten ist, daß die den Schutz des Angeklagten bezweckenden Vorschriften nicht eingehalten werden, oder wenn an dem Verfahren aus anderen Gründen ein erhöhtes Interesse besteht.

7. Befinden sich Deutsche aufgrund eines deutschen Fahndungs- - oder Auslieferungsersuchens in Haft - siehe hierzu RES 53/16 betr. „Auslieferungs- und sonstiger Rechtshilfeverkehr in Strafsachen mit dem Ausland" (i.d.F. vom 20.10.92) -, besteht ebenfalls eine Verpflichtung zur konsularischen Betreuung, sofern die Inhaftierten es wünschen. Auf korrekte Behandlung der Inhaftierten durch die Behörden des Gastlandes ist ebenso zu achten wie auf eine beschleunigte Durchführung des Auslieferungsverfahrens.

8. a) Werden betreute Untersuchungs- oder Strafgefangene nicht korrekt behandelt oder drohen gesundheitliche Schäden, so prüfen die Vertretungen, welche Maßnahmen sie zur Behebung der Mißstände ergreifen können. Bei Gefahr im Verzuge sollten die Auslandsvertretungen unverzüglich bei den zuständigen Stellen des Gastlandes vorstellig werden, unabhängig von möglichen Schritten der Verteidiger. Da Beanstandungen der Haftbedingungen zu Vergeltungsmaßnahmen gegen die Gefangenen führen könnten, empfiehlt es sich jedoch, deren Zustimmung einzuholen.

Wenn deutsche Inhaftierte Menschenrechtsverletzungen ausgesetzt sind, soll die Vertretung gegenüber den zuständigen Behörden des Gastlandes gegen die Menschenrechtsverletzung protestieren und auf die umgehende Abstellung der rechtswidrigen Behandlung der Deutschen drängen. Demarchen auf Regierungsebene sollten mit dem Auswärtigen Amt abgestimmt werden.

b) Die Vertretungen sollten auch darauf achten, daß Aburteilungen innerhalb einer angemessenen Frist erfolgen bzw. daß die Dauer der Untersuchungshaft angesichts der zu erwartenden Strafe verhältnismäßig bleibt.

9. Die Auslandsvertretungen sollen die Stellung von Sicherheitsleistungen (Kautionen) im Rahmen des Möglichen fördern. Dazu können Angehörige und Freunde im Heimatland kontaktiert werden. Auslandsvertretungen können ferner als Mittler bei der Weiterleitung von Kautionen fungieren. Eine Übernahme dieser Kosten im Rahmen einer Hilfe nach § 5 KG ist allerdings grundsätzlich nicht möglich. In Ausnahmefällen (akute Gefahr für Leib und Leben) ist zu berichten (s. RES 54/30 Ziffer 5.7).

10. a) Es wird den Auslandsvertretungen empfohlen, nach Bedarf Merkblätter zu entwickeln und auszugeben, die den Inhaftierten in allgemeiner Form über seine Rechte unterrichten und sonstige für ihn wissenswerte Informationen enthalten. Diese Merkblätter sind ständig zu aktualisieren. Sie sollten mit anderen deutschen Vertretungen im Gastland und, wo angebracht, im EU-Kreise abgestimmt sein.

b) Inhaftierte und deren Angehörige neigen nicht selten dazu, die Vertretungen für schwierige Verhältnisse mitverantwortlich zu machen. Es ist daher - insbesondere bei längeren Haftfällen - dringend zu empfehlen, alle Tätigkeiten der Vertretung schriftlich festzuhalten, um bei möglicher Kritik reagieren zu können.

c) Die Vertretungen, in deren Amtsbezirk sich regelmäßig mehr als fünf betreute Untersuchungs- oder Strafgefangene befinden, sollten eine Liste der Untersuchungs- und Strafgefangenen führen. Diese Liste sollte Namen, Geburtsdatum, Staatsangehörigkeit, Verhaftungsdatum, Strafvorwurf, Datum, Rechtskraft und Strafmaß der Verurteilung, die Strafvollzugsanstalt, das befaßte Gericht, den Verfahrensstand und die Geschäftszeichen, unter denen der Haftfall beim Gericht, bei der Vertretung und ggf. der Haftanstalt und der Staatsanwaltschaft geführt wird, Anwalt mit Kontaktadresse sowie die Haftbesuche umfassen. Die Listen sollten ständig aktualisiert werden. Zur Vorlage der Listen werden ggf. Einzelweisungen ergehen.

11. Die Auslandsvertretung sollte geeignete Einzelpersonen, (z.B. Geistliche, Sozialhelfer) oder Gefangenenhilfsvereine bitten, sich an der Gefangenenbetreuung zu beteiligen. Die Arbeit dieser freiwilligen Helfer sollte von den Vertretungen nach Kräften unterstützt und regelmäßig (z.B. im Rahmen von Einladungen) gewürdigt werden. Die Häftlingsbetreuung durch freiwillige Helfer kann aber nur eine willkommene Ergänzung sein. Die Verantwortung der Vertretung bleibt unberührt.

12. Was Auskünfte an die Presse über Verhaftungen von deutschen Staatsangehörigen betrifft, so wird auf die allgemeinen Runderlasse des Pressereferates verwiesen.

III.

1. Über Inhaftierung von Deutschen ist umgehend zu berichten, wenn Grund zu der Annahme besteht, daß das Auswärtige Amt befaßt werden wird oder daß die Presse den Fall aufgreift. Zu berichten ist auch bei Menschenrechtsverletzungen (s.o. Abschnitt II, Ziffer 8a, die Beteiligung des ASMR sollte im Bericht angeregt werden) und wenn ganze Gruppen von Deutschen verhaftet werden (z.B. Demonstranten).

Auch über ander politisch gewichtige Haftfälle soll jeweils umgehend berichtet werden, z.B. über Verhaftung von deutschen Journalisten oder von Personen, die sich im amtlichen Auftrag im Ausland aufhalten (Entwicklungshelfer, Kulturschaffende).

2. Über die Haftentlassung deutscher Untersuchungs- oder Strafgefangener ist zu berichten, falls zuvor über ihre Verhaftung berichtet worden ist.

3. Die gemäß Bezugs-Runderlaß zu 2. von ausgewählten Vertretungen dem ASMR vorzulegenden Menschenrechtsjahresberichts werden immer dann von ASMR im Doppel an Referat 511 weitergeleitet, wenn sie Aussagen zu Folter, unmenschlicher Behandlung, Haftbedingungen, Verhängung und Vollzug der Todesstrafe, Verletzungen von Verfahrensgarantien im Strafverfahren oder politischen Straftaten enthalten.

4. Die Berichterstattung über die Verurteilung und Straftaten Deutscher regelt sich außerdem nach RES 53/14 (i.d.F. vom 15.03.1996).

5. Für Personen, die im Deutschen Fahndungsbuch ausgeschrieben sind, gilt RES 53/7 (i.d.F. vom 26.06.1998).

IV.

Die Erstattung von Geldleistungen gemäß Abschnitt II Ziffer 5 oder 9 sowie die Vergütung von Sachleistungen, die deutschen Untersuchungs- oder Strafgefangenen gewährt worden sind, regeln sich nach § 5 Abs. 5 Konsulargesetz und § 7 Abs. 1 AKostG (siehe auch Runderlaß RES 54/30).

Im einzelnen gilt folgendes:

1. Die Tätigkeit der Auslandsvertretungen im Rahmen der notwendigen Betreuung gem. § 7 KG von Untersuchungs- und Strafgefangenen ist gebühren- und auslagenfrei. Zu der notwendigen Betreuung zählt insbesondere die erste Kontaktnahme (s.o. Abschnit II, Ziff. 1), bei der es unerheblich ist, ob ein Antrag des Inhaftierten vorliegt oder nicht, weil die Vertretung eine von Amts wegen bestehende Pflicht erfüllt. Im weiteren Verlauf der Häftlingsbetreuung ist für die Kostenfrage abzuwägen, ob ein übergeordnetes Interesse der Allgemeinheit vorliegt oder lediglich ein individueller Wunsch des Inhaftierten. Ein übergeordnetes Interesse der Allgemeinheit ist in der Regel anzunehmenwenn wenn besonders schwierige Haftbedingungen vorliegen, bei Haftbesuchen und Betreuungsmaßnahmen auf gesonderte Weisung des Auswärtigen Amtes und bei Maßnahmen der Vertretungen bei Menschenrechtsverletzungen. Auch in diesen Fällen gilt Gebühren- und Auslagenbefreiung.

2. Nach § 5 Abs. 5 Konsulargesetz und § 7 Abs. 1 AKostG sind grundsätzlich alle Auslagen zu erstatten, die für die Betreuung auf Antrag des Gefangenen entstehen, also sowohl Auslagen, die die Auslandsvertretungen an Dritte leisten (z.B. Kauf von Lebensmitteln, Kleidung oder anderen Gegenständen, Porto bei Aufgabe von Post, Telefonate) , als auch diejenigen, die den Vertretungen selbst entstehen (z.B. Fahrtkosten durch besonders häufige und den Umständen nach nicht notwendige Haftbesuche auf ausdrücklichen Wunsch des Häftlings).

   Die Nutzung des amtlichen Weges über die Legationskasse für Überweisungen ist kostenlos, ebenfalls die Weiterleitung des Geldes an die Inhaftierten.

   Soweit für Auslagen ein Darlehen gem. § 5 KG gewährt wird, ist die Gewährung der Hilfe gebührenfrei. Die Gewährung eines Darlehens für die Heimreise nach Entlassung aus der Haft gehört nicht mehr zu Gefangenenbetreuung, die Gewährung ist gebührenpflichtig.

   Fernschreib-, Telefon-, Paßgebühren u.a., die im Zusammenhang mit einer Hilfe nach § 5 KG entstehen, sind in die Hilfe einzubeziehen und nicht mit gesonderter Kostenrechnung anzufordern.

3. Unter den Voraussetzungen von § 10 Abs. 1 und 3 AKostG kann von der Erhebung der Kosten ganz oder teilweise abgesehen werden.

4 Die Vertretungen sollten gegebene Möglichkeiten zur Kosteneinsparung nutzen und im Rahmen der ersten Kontaktnahme mit einem Häftling, (s.o. Abschnitt II Ziffer 1) soweit möglich auch Besuche bei anderen Deutschen durchführen, die in der gleichen oder einer benachbarten Anstalt inhaftiert sind. Dabei entstehende geringfügige Mehrkosten können ebenfalls auf amtliche Mittel übernommen werden.

   Insbesondere in größeren Flächenstaaten sind Dienstreisen aus anderen Anlässen auch zu nutzen, um Häftlinge vor Ort zu betreuen.

5. Auslagen, die erst nach Rückkehr des Kostenschuldners (§ 13 AKostG) in die Bundesrepublik Deutschland zur Erstattung angefordert werden können, sind mit Kostenrechnung anzufordern. Nimmt der Kostenschuldner in einem anderen Land Wohnsitz, sind die Auslagen durch die für den Wohnsitz des Schuldners zuständige Auslandsvertretung einzuziehen. Auf die Möglichkeit des § 16 AKostG wird hingewiesen.

6. Ist die inhaftierte Person zur Zahlung eines Vorschusses auf die zu erwartenden Kosten oder einer Sicherheitsleistung hierfür nicht in der Lage und können auch Familienangehörige die Kosten nicht vorfinanzieren, so empfiehlt sich in der Regel eine Verpflichtungserklärung. Wurde eine solche abgegeben, ist diese anläßlich der Übersendung der Kostenrechnung dem Bundesverwaltungsamt vorzulegen.

7. Soweit sonst noch Auslagen entstehen, ist gemäß RES 54/30 (i.d.F. vom 04.02.1994 513-542.15) zu verfahren.

V.

- Datenschutz -

Soweit die Betreuung inhaftierter Deutscher auf Grundlage des Konsulargesetzes die Erhebung, Verarbeitung (wozu auch die Datenübermittlung gehört) oder Nutzung personenbezogener Daten durch die Auslandsvertretung erforderlich macht, hat dies unter Beachtung der einschlägigen Vorschriften (insbes. §§ 13 ff) des Bundesdatenschutzgesetzes (BDSG) zu erfolgen. Auf den Runderlaß des Datenschutzbeauftragten des Auswärtigen Amts vom 15.6.1991 - 110-3-204.02/32 - (RES 20/81) wird in diesem Zusammenhang hingewiesen. Sollte eine Auslandsvertretung eine Datei mit den personenbezogenen Daten der im Gastland Inhaftierten führen, so ist diese Datei dem Datenschutzbeauftragten des Auswärtigen Amtes mit der jährlichen Dateimeldung mitzuteilen. Dasselbe gilt für die gemäß Abschnitt II, Ziffer 10 c) zu erstellende Haftliste.

VI.

Dieser Runderlaß ist allen (auch nur vertretungsweise) mit RK-Angelegenheiten befaßten Bediensteten bei ihrem Dienstantritt sowie danach jährlich nachweislich bekanntzugeben.

Der Bezugserlaß zu 1. vom 26.10.1992 wird aufgehoben; der vorliegende Runderlaß wird an seiner Stelle unter RES 53/6 in die RES aufgenommen.

Im Auftrag

Anlage 1

Gz.: 511-531.41

RE vom 15.10.1998

Standard Minimum Rules For The Treatment Of Prisoners and

Translation

Re: Support for Germans remanded in custody pending trial or serving a prison sentence abroad

I. Introduction

1. What it means for diplomatic missions abroad to care for Germans serving a prison sentence

2. Legal basis

II. Measures to be taken

1. Duty to establish contact

4. Measures to be taken in caring for prisoners

  (a) ways in which contact may be established
  (b) the first contact
  (c) informing the prisoner of his/her rights
  (d) informing the prisoner's family and friends, as well as third parties
  (e) transferring money
  (f) assistance for living expenses, Christmas donations

5. Putting prisoners into contact with lawyers/interpreters, court-appointed counsels for the defence

6. Attending court hearings

I.

1. Arrest represents a particularly severe encroachment on a person's individual freedom. If the arrest takes place abroad, the detainee usually experiences additional difficulties to those he or she would have experienced in Germany, for example, due to communication difficulties, an unfamiliar social and legal system and lack of knowledge of other local conditions.

It is therefore extremely important that Germans under arrest abroad are provided with fast, professional all-round support by German diplomatic missions abroad, regardless of the reasons for the arrest.

A brochure entitled "Unser Konsulardienst - Hilfe und Service für den Bürger weltweit" (Our consular service - help and service for citizens world-wide) was issued in spring 1998 to inform the German public of the assistance provided for Germans under arrest by German diplomatic missions abroad. The publication has also been sent to the German diplomatic missions abroad. The citizen has every right to expect missions to provide committed, sympathetic consular assistance for those Germans finding themselves under arrest, often in very difficult circumstances.

II.

Since there are great variations in the conditions in different host countries, it is inevitable that an overview of the measures to be taken pursuant to Sections 1, 5 and 7 of the Consular Law cannot be exhaustive. However, the following guidelines are relevant for most countries:

1. Section 7 of the Consular Law states explicitly that the duty to attend to prisoners is dependent on the prisoner making a request to that effect. German diplomatic missions abroad should nevertheless establish contact with any Germans of whose arrest they are informed. This is in line with their general obligation to provide support pursuant to Sections 1 and 5 (1) of the Consular Law; Section 7 of the Consular Law for its part, is not to be regarded as a special, exclusive regulation, but rather as a complementary provision. Unless contact is established through official channels, Germans committed to custody pending trial or to prison would often have no opportunity to make a request as defined in Section 7 of the Consular Law. The first consultation does not therefore represent support as defined in Section 7 of the Consular Law. Any further measures in the interests of the detainee are, however, subject to his/her manifestation of will.

4. (a) As soon as a German diplomatic mission abroad has received information of the arrest of a German citizen in its consular district, it should ask the competent authority in the host country as to the reason for the arrest and establish contact with the detainee at the earliest possible opportunity. Contact may be made in one of the following ways:

- members of the diplomatic mission visit the detainee,
- a person appointed by the diplomatic mission (e.g. a lawyer, a pastor, or a member of a charitable organization) is requested to visit the detainee,
- by telephone or by letter.

(b) The initial contact with detainees should clarify the following:

- exact personal data (*inter alia* name, nationalities, identity documents and home address as well as the name, telephone number and address of close relatives),
- whether they would like to be attended to by the German diplomatic mission abroad (see above, section II 1),
- if they know the reasons for their arrest,
- if they require interpreters,
- if they have been treated properly, particularly if internationally recognized minimum standards have been adhered to and if they have suffered discrimination in comparison with citizens of the host country,
- if their health has suffered, if medical treatment has been given, and, if so, if it was appropriate,
- if they have been provided with sufficient clothing and toiletries,
- if any family members should be informed, and if so, who (in the case of detained minors the closest relatives must be informed),

- if they have already appointed a lawyer (name, address) or would like to be put in touch with a counsel for the defence.

(c) The diplomatic mission should ensure that the detainee is aware of his/her rights under local legislation. Such information may be in the form of a leaflet which also explains what the German diplomatic mission can do for the detainee. Any legal information should be provided with the proviso that it is intended to serve as an initial orientation and cannot substitute the detailed legal advice of a lawyer who is familiar with the usual practice in the host country. It is also expedient to point out to detainees that they may be required to repay any outlays made on their behalf.

(d) Diplomatic missions should inform members of detainees' families directly, or in a telex via the Federal Criminal Police Office in Wiesbaden, requesting that the local police station take charge of this task.

Regular contact to members of a detainee's family may be appropriate, e.g. if the detainee has serious health problems or there is no defence lawyer who can inform them of the proceedings. However, relatives should also be informed in detail of the scope and tasks of the diplomatic missions, as their expectations are often unrealistic.

In order to protect the detainee's privacy, answers may only be given to enquiries concerning details of the arrest with the agreement of the person concerned.

(e) If money cannot be transferred by any other means, the following Federal Foreign Office account may be used for this purpose (account number 38001025, Landeszentralbank Bonn, sort code 380 000 00). The transfer form must state the purpose of the payment (e.g. "payment on behalf of + name of prisoner") as well as stating which diplomatic mission is attending to the detainee.

(f) Trust is often built up between an Embassy and long-term detainees through the provision of reading material or essential items. The conditions in the host country may be such that regular support is required.

If it is likely that the detainee will require financial support for essential items for more than two months, it should be considered whether he/she should be encouraged to submit an application for social assistance for Germans abroad (see RE [circular] 513-542.10 of 18 January 1995, RES [collection of circulars] 54/4, items 3.2.3, 4.3 and 5.4.1.4 as well as service instructions on assistance for Germans abroad "Hilfe für Deutsche im Ausland" 513-542.15 of 4 February 1994 - RES [collection of circulars] 54/30 items 2.9 and 5.5). For periods of under two months essential financial support shall be made through payments under Section 5 of the Consular Law.

The German Red Cross can also provide a small Christmas contribution for long-term detainees in Central, Eastern and South-Eastern Europe. Diplomatic missions should submit applications directly to the German Red Cross, (Deutsches Rotes Kreuz, Suchdienst Hamburg, Postfach 306123, 20327 Hamburg), enclosing an outline of the circumstances of the case.

5. If the detainees request to be put in contact with a defence lawyer they should, if possible, be given the names of suitable and reliable lawyers. It should be made clear to the detainee, however, that the diplomatic missions cannot be made liable for the lawyers' work ("no responsibility taken") and that any contractual relationship is between the detainee and the lawyer only.

An interpreter should be made available if required so that detainees are able to communicate with their defence lawyers.

If neither the detainees nor their families place any value on selecting a defence counsel or an interpreter themselves, which usually involves advance payment of the fee, efforts should be made to ensure that a counsel for the defence is appointed by the court, and if necessary, an interpreter, paid for by the host country, is also assigned.

Only as a last resort subject to the approval of the Federal Foreign Office can assistance for essential legal protection costs be granted under Section 5 of the Consular Law, and only if the conditions listed under RES 54/30 item 5.7 are met.

6. It may be advisable, due to the special circumstances in the host country or the significance of the case, to attend court hearings. Members of the competent German diplomatic mission abroad or persons commissioned by the diplomatic mission should, if possible, at least attend to observe the proceedings if it is to be feared that the regulations for the protection of the accused are not adhered to or if the case attracts a high level of interest for other reasons.

It is hereby certified that the above is a true and accurate translation from the German into the English language

AUSWÄRTIGES AMT DER BUNDESREPUBLIK DEUTSCHLAND

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Annex MG 48

SUPREME COURT OF THE UNITED STATES,
PARAGUAY V. *GILMORE*,
BRIEF OF *AMICI CURIAE* ARGENTINA, BRAZIL, ECUADOR AND MEXICO IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI
(26 MARCH 1998)

No. 97-1390

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

THE REPUBLIC OF PARAGUAY and
JORGE J. PRIETO, Ambassador of the Republic of
Paraguay to the United States, and
JOSÉ MARÍA GONZALEZ AVILA, Consul General
of the Republic of Paraguay to the United States,
Petitioners.

— v. —

JAMES S. GILMORE III, Governor
of the Commonwealth of Virginia, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE REPUBLIC OF ARGENTINA, REPUBLIC OF BRAZIL, REPUBLIC OF ECUADOR, AND REPUBLIC OF MEXICO IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Dated: March 26, 1998

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

Arthur W. Rovine, Dept. of State, *Digest of United States Practice in International Law, 1973* 7

S.A. Shank & J. Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 St. Mary's L.J. 719 (1995) 6, 13, 14, 16

Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities, 78 Minn. L. Rev. 771 (1994) 14

I.
INTEREST OF AMICI CURIAE

Amici nations[1] have a vital interest in ensuring compliance with the Vienna Convention on Consular Relations[2] by the United States and its political subdivisions. The protection and support of persons who have been charged with crimes, convicted, or imprisoned by a foreign nation has always been a critical function of consular officials. Thousands of nationals of amici nations travel to the United States each year or reside in this country, and it is incumbent on the consular officials of amici nations to assist and protect those that become involved with the criminal justice system here. Consuls can discharge that responsibility only if they know of the detention of their nationals by law enforcement authorities. Article 36 of the Convention is designed specifically to ensure that consuls *do* know of the detention of their nationals, and compliance with it is therefore indispensable to the effective performance of consular functions. Those functions can include addressing appropriate authorities on behalf of the detained national, assisting in discovery and collection of mitigating evidence, monitoring of proceedings and incarceration, and advising detained nationals about the United States justice system and differences between that system and the justice system in the accused's country of origin

The United States is the only Western industrialized nation that still imposes the death penalty.[3] Because of the severity of the potential punishment, a consul has a special interest in assisting a national who faces a capital charge. The failure of law enforcement officials in the United States to comply with Article 36's consular notification provision eviscerates consuls' right to assist, protect, and ensure the fair treatment of their nationals. Indeed, the case of Angel Breard, from which the instant action by Paraguay arises, is by no means unique. In several other capital cases, a foreign state or national has raised the issue of non-compliance with the Vienna Convention in the federal courts.[4] Courts, while recognizing the existence of recurring violations of the Vienna Convention, have considered themselves unable to grant relief.

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[1] Pursuant to the disclosure requirement of Rule 37.6 of the Rules of this Court, Amici make the following disclosures: This Brief was not authored in whole or in part by counsel for any party, and no monetary contribution to the preparation or submission of the Brief was made by any person or entity other than Amici or their counsel.

[2] April 24, 1963, T.I.A.S. 6820, 21 U.S.T. 77 [hereinafter "Vienna Convention," "Convention," or "VCCR"]

[3] *See* Amnesty International, *The Death Penalty: List of Abolitionist and Retentionist Countries*, at 5 (1996).

Thus, amici nations have a vital interest in persuading this Court to hear Paraguay's case.[5] A decision by this Court would establish a nationwide precedent that would extend beyond the particular action to every instance in which authorities arrest a foreign national. Further, as the United State has itself recognized, the continuing vitality of the Vienna Convention depends upon reciprocity of enforcement between foreign nations. Thus, the resolution of this case will have a direct effect on each amicus nation. In the absence of a decision by this Court, violations of the Vienna Convention will continue unabated and amici nations will be denied their rights under United States and international law.[6]

II.
RESERVATION OF IMMUNITY

Nothing in this Brief shall be construed as a waiver of the immunity to which the Republic of Argentina, Republic of Brazil, the Republic of Ecuador, or the Republic of Mexico is entitled by virtue of International law or the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.*, any immunity or privilege established by the Vienna Convention or of any defense, right, or immunity which the Republic of Argentina, Republic of Brazil, the Republic of Ecuador, or the Republic of Mexico may have a right to assert. It also shall not imply a submission to the jurisdiction of the United States by the Republic of Argentina, Republic of Brazil, the Republic of Ecuador, or the Republic of Mexico.

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[4] For examples of capital cases in which the issue of non-compliance with the Vienna Convention has arisen, *see, e.g.*, *United Mexican States v. Woods*, 126 F.3d 1220, 1222-1223 (9th Cir. 1997) (Arizona); *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997) (Virginia); *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996) (Texas).

[5] Because of the substantial importance it attaches to consular notification, the Republic of Mexico has requested an advisory opinion before the Inter-American Court of Human Rights of the Organization of American States on this issue.

[6] Argentina's interest in this action is based not only on the respect that all states owe to the Vienna Convention, but also upon the fact that Mr. Breard was born in Argentina and is of Argentine origin.

III.
STATEMENT OF CONSENT OF PARTIES

The written consents of Petitioner and Respondents to the filing of this Brief of Amicus Curiae are filed concurrently and attached hereto.

IV.
SUMMARY OF ARGUMENT

The Vienna Convention plays a vital role in the protection and fair treatment of foreign nationals present in another state by requiring, among other things, that arresting authorities promptly notify a foreign national of his or her right to contact a consular official. The right to contact a consular official is a critical one, as the United States has repeatedly recognized in actions and statements by the Departments of State and Justice. In fact, the United States is one of the most vociferous advocates of the Convention and insists upon strict compliance with it when an American is detained abroad. However, the viability of the Vienna Convention depends on reciprocal compliance by signatory states. Failure to comply by one nation imperils the entire structure established by the Convention. By failing to inform arrested foreign nationals of their rights, officials of Virginia and other states have imperiled the continuing viability of the Vienna Convention.

Adherence to the Vienna Convention ensures that consuls can continue to provide substantial and meaningful assistance to their nationals. That assistance can include addressing local authorities on behalf of an accused national, assistance in the dealings with local authorities" and "to represent Mexicans who are absent or otherwise incapable of handling their own affairs." Lee, *supra*, at 127 (quoting *Ley Organica del Servicio Exterior Mexicano y su Reglamento*, Art. 88).

Monitoring Proceedings and Incarceration: Consuls also can play an essential role in monitoring proceedings against the national to ensure fairness and compliance with international standards and monitor the pre- and post-trial conditions of incarceration. For example, the United States requires its consuls to monitor the well being of incarcerated American citizens, protest discrimination against detained citizens, and attend the trial of any American, even in the absence of discrimination, *see* Lee, *supra*, at 169-71 (quoting Dep't. of State, *Consular Instructions* 421.3, 431.2, 431.3), and the United Kingdom requires its consuls "to intervene in judicial proceedings" in the event of a "prima-facie miscarriage or denial of justice" or "the futility of appeal to a higher authority." Lee, *supra*, at 125 (quoting *United Kingdom Foreign Service Instructions* VIII-16 (vi)). Consuls cannot perform the monitoring function unless they know of the proceedings against a national. In most cases, they will become aware of those proceedings only when the Vienna Convention is complied with by authorities of the Receiving State.

Moreover, the monitoring function does not exist simply to provide comfort or reassurance to the accused foreign national. Rather, it increases the chances that the defendant will receive a truly fair trial. The possibility of discrimination is substantial in a proceeding against a foreign national, especially in a capital cases. *See* Shank & Quigley, *supra*, at 741. Consular monitoring and presence during the course of proceedings can reduce the possibility of discrimination. *See id.* at 744. Thus, an accused foreign national can suffer substantial harm, in the form of discrimination, when a consul is not monitoring the proceedings. That harm is suffered in every case where authorities fail to comply with the Vienna Convention, because those cases will not have any monitoring of the proceedings to ensure the absence of discrimination.

VI.
CONCLUSION

As the United States has itself emphasized, the continuing vitality of the Vienna Convention depends upon reciprocity among its signatories. Therefore, violations of Article 36 by state officials undermine treaty provisions that form a cornerstone of consular relations and that are essential to the fair treatment both of foreign nationals detained in this country and of United States citizens who are detained abroad. Yet in the face of an admitted violation of Article 36, committed in the gravest of cases — one in which a political subdivision of the United States seeks to put a foreign national to death — the Fourth Circuit has ruled that it can afford no relief either to the accused or to Paraguay, his nation of origin.

Because violations of Article 36's notice provisions typically come to light only after an accused has been convicted and sentenced — as did the violation here — the Fourth Circuit's interpretation of the Eleventh Amendment means that federal courts will virtually always be powerless to remedy Article 36 violations. Yet it is to the federal courts that sovereign nations must be able to turn effectively to redress violations of their rights under Article 36. No less a document than the United States Constitution charges the federal courts with the responsibility for such cases. *See* U.S. Const., Art. 3, § 2 (judicial power of federal courts extends to cases arising under United States' treaties); *see also* 28 U.S.C. § 1331 (same). While foreign sovereigns might choose to bring state court actions to redress violations of the Vienna Convention, it would be an odd result indeed if foreign nations — complaining of the violation of rights arising under a treaty ratified by the President with the advice and consent of the Senate, enforced by federal regulation, and repeatedly invoked by the State Department in the conduct of this nation's foreign affairs — must resort to courts of the state whose officials have perpetrated the treaty violation.

The consular notice provisions of Article 36 confer rights that both the United States and amici view as being of the highest order. The Fourth Circuit's decision, closing the doors of the federal courts to sovereign nations complaining of Article 36 violations, effectively sanctions recurring violations of the Vienna

Convention that threaten to undermine its continuing vitality. The decision below, viewed in light of the reciprocal nature of Article 36 and its fundamental significance for the conduct of foreign relations, therefore raises "important question[s] of federal law that [have] not been, but should be, settled by this Court," Sup. Ct. R. 10(c). Amici accordingly urge this Court to grant Paraguay's Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

DATED: Los Angeles, California
March 26, 1998

Respectfully submitted,

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Annex MG 49

AFFIDAVIT OF SCHARLETTE HOLDMAN

DECLARATION OF SCHARLETTE HOLDMAN, PH.D.

I, Scharlette Holdman, declare as follows:

1. I am a Mitigation Specialist with the Center for Capital Assistance [CCA], a non-profit organization providing legal assistance to court-appointed counsel in capital cases involving indigent defendants. CCA's staff routinely investigates and develops evidence for presentation in penalty phases and sentencing hearings of capital trials. We also investigate and develop evidence related to innocence, relative culpability, reliability of statements and confessions, and mental health claims, including mental status at the time of the offense and competency at various stages of capital proceedings.

2. I have twenty years of experience in assisting counsel in capital trials and post-conviction proceedings, in determining the scope of investigation necessary for preparation and presentation of mitigation and other mental health claims, in developing evidence for penalty phase (or sentencing) proceedings, and in providing mental health and mitigation experts the kind of materials they routinely rely upon in their professions in order to offer reliable expert opinions.

3. I have served as a faculty member in numerous CLE-approved training seminars for capital litigation sponsored by the American Bar Association, state bar associations, state and federal public defenders, professional associations, and colleges of law in Arizona and other states, including: Alabama, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Nevada, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Texas, Washington and Virginia.

4. From 1978 to 1985, I was Executive Director of the Florida Clearinghouse on Criminal Justice and directed a state-wide program for recruiting, training and assisting appointed and pro bono attorneys in developing and presenting penalty phase evidence in capital cases. In 1985, Florida's legislature recognized the need for trained counsel in capital cases and created the nation's first state agency whose sole

responsibility was to provide counsel in post-conviction capital proceedings. I served as that agency's Chief Investigator and designed and directed the agency's mitigation program, selecting, training, and supervising a staff of ten mitigation specialists and investigators.

5. In 199[illegible], I joined the staff of the California Appellate Project, where I served as Mitigation Specialist and supervised 20 Thurgood Marshall Investigator Interns who assisted court-appointed counsel in capital cases in identifying, developing and presenting mitigation evidence. In each of my positions, my responsibilities also included identifying and developing mitigation evidence for individual capital cases.

6. At the request of current counsel for Walter B. Lagrand, I and my staff have reviewed the Third Petition For Postconviction Relief, currently pending in the Superior Court of Pima County, as well as a very limited summary of testimony presented at Mr. Lagrand's 1984 sentencing hearing, and preliminary information about Mr. Lagrand's life history. We reviewed this information to determine what investigation must be conducted to properly identify and develop mitigation evidence that was available and should have been presented to the sentencing court at the time of trial.

7. The standard of care in capital cases in state and federal courts requires that an in-depth investigation be conducted to develop a reliable social history, including all factors -- familial, medical, psychiatric, cultural, institutional -- which shaped and influenced Mr. Lagrand's cognitive and emotional development and influenced his behavior and functioning as an adult. That social history is the first step in preparing for the penalty phase of a capital trial, without which counsel can not determine the range of mitigation available for presentation. That history is also necessary to allow competent counsel to anticipate, rebut and/or mitigate evidence offered by the prosecution in aggravation. Failure to conduct that investigation and obtain that history falls below any standard of practice.

8. The materials provided include reports and documents regarding Walter Lagrand's parentage, his early childhood in Germany, profound physical neglect necessitating intervention by state agencies, repeated physical illnesses and hospitalizations, early institutional and foster placements, subsequent returns to his hostile mother (when he would accept them back), frequent upheavals as they moved between various parts of Germany and the United States, and brutal maltreatment of Walter and his sibling at the hands of their step-father, both in Arizona and upon returning to Germany. These documents are incomplete. Nonetheless, even these few records indicate that powerful and compelling mitigation evidence was available to counsel in 1984, and that it included a range of issues which have repeatedly been recognized by state and federal courts.

9. Failure to meet that standard establishes a post-conviction claim which is only rendered possible when supported by the same evidence which should have been, but was not, offered at sentencing. Thus, competent post-conviction counsel must scrutinize trial counsel s investigation and representation to ensure that his/her client was provided a constitutionally competent defense. It is my understanding that after Walter Lagrand was convicted and sentenced to death, trial counsel remained as counsel through his state appeal and all post-conviction proceedings. It is therefore not surprising that his blatant omissions and failures at trial were not raised in subsequent proceedings. What is surprising is that he was permitted to continue his representation up until late last week, less than one week before Walter Lagrand is scheduled to be executed.

10. The same standard requires that the mitigation investigation be based on methods of data collection that are accepted in both the legal and medical communities. The data must be competent, reliable and valid evidence. An accurate social history must be supported by independently gathered evidence from as many divergent sources as possible.

11. A social history, or any clinical evaluation, based solely on the self-reports of the defendant is clinically unreliable. Collateral evidence obtained from health care providers, social service agencies, law enforcement, official records, and the observations of family, friends, neighbors, employers, caretakers and teachers usually exists to support valid mitigation claims. One of the most critical aspects of the investigation is to locate and interview family members, all known caretakers, peers, health care providers, clergy, and others who knew the individual and his family at critical developmental periods. As part of a competent investigation, this evidence must be obtained, analyzed, and viewed in context with data and records obtained from other sources.

12. Only with properly and independently gathered data can mental health professionals assess: (1) the presence and effect of medical, psychiatric and developmental disorders; and (2) the role of critical social, emotional and other factors, including pivotal life experiences, and their effect of the individual's mental state and behavior at critical points relevant to the charges and subsequent legal proceedings. The necessity of detailed and independent data is exponentially increased in a case, such as this, in which brothers – with inherently competing interests, overwhelming emotional conflicts, and potentially insurmountable pressures – are on trial for their lives in one courtroom.

13. It appears that no such history was ever prepared, nor was any meaningful investigation conducted on behalf of Walter Lagrand, despite obvious indicators of truly significant mitigators: a violent and chaotic childhood, cultural and racial isolation and disenfranchisement; documented early neglect so profound that the Lagrand children were repeatedly hospitalized for malnutrition and criminal charges filed against their caretaker, institutionalization for periods of months and years following repeated abandonment by both parents, and years of brutal treatment by their later step-father, a recently-returned Viet Nam veteran whose war-time experiences and chronic alcoholism resulted in extreme and unpredictable violence toward both his wife and his unwanted

step-children. Although the hearing transcript indicates that a few isolated facts were identified, they were incomplete, unsupported by reliable collateral evidence, and never put in context by appropriate experts.

14. This is seen, for example, in the vast and complex cultural/racial obstacles faced by the Lagrand siblings. These three children were, in effect, socially identified as being from three races, all of them alien to the culture (Germany) in which they lived. They had different fathers, none of whom were present, and raised in an inter-racial household by an unwed mother in a society where racism and nationalism were profound and pervasive. Nonetheless, trial counsel failed to locate or interview either of Mr. Lagrand's parents, nor did he provide an expert to discuss the implications of cultural isolation and racial disenfranchisement, and the effects on the social and psychological development of the Lagrand children. Indeed, the only witness who alluded to this issue at all was Dr. Meshorer, who testified *not* for Walter Lagrand, but on behalf of Walter's brother and co-defendant, Karl Lagrand.

15. Walter Lagrand was born to a German woman, Emma Gebel, in a German hospital, aided by a mid-wife whose name was known. The birth records were never obtained, nor was any effort made to locate the mid-wife, Ms. Gebel's family, or anyone who knew her during and after her pregnancy. I am informed that, at the time of trial and for several years thereafter, counsel was not even aware that his client was a German citizen.

16. Mr. Lagrand was the second of three children, all by different fathers. No attempt was made by counsel to locate any of these men or their families. Walter's father was Tirso Molina-Lopez, an American soldier of Puerto Rican descent. No attempt was made to locate Mr. Molina-Lopez or investigate his background. Thus, counsel had no information about the medical, cognitive or psychiatric vulnerabilities of his client, nor did he obtain any information concerning the relationship between Walter Lagrand's parents, or the effects on young children known to be illegitimate, fatherless,

and racially disparate. (Walter's half-brother's father was African-American; his half-sister's father was German.) In the past days, new counsel has apparently located and interviewed Mr. Molina-Lopez and learned critical information about both Walter Lagrand and his mother, including the fact that Emma Gebel drank alcohol throughout her pregnancy.

17. Newly-obtained records show that Walter was abandoned to a grandmother immediately following his birth, and that he and his siblings were hospitalized repeatedly beginning when he was approximately four months old. They were diagnosed with "nutritional dystrophy," caused by neglect. Malnutrition requiring hospitalization, especially at such early stages of development, often has profound and irreversible consequences, impeding both physical development and cognitive functioning in later life. Before his first birthday, Walter was again hospitalized for the same condition, this time for several months. Between hospitalizations, he was in the custody of his maternal grandmother. Social service records describe her as "harsh and rough with the children." They were eventually removed from her care upon the recommendations of a welfare caseworker.

18. Trial counsel did not locate or interview the caseworker or any of the treating doctors or social service workers, nor did he request records from any of the facilities or agencies involved. Failure to conduct even these minimal inquiries is inexcusable. Without the information contained in these documents, and known to these and other individuals, information obtained from later periods in Walter's life would be without context, and even competent mental health professionals would be severely hampered in their attempts to accurately assess his behavior and abilities. Also critical to this case, far moreso than in most, would be a thorough understanding of the family's experiences and dynamics among the siblings, who not only sustained common (and likely horrifying) experiences as children, but also suffered prolonged periods of separation and conflict. Trial counsel failed to investigate that history, even though

Walter Lagrand's brother was also the co-defendant who sought to place responsibility on Walter for his own criminal behavior. The names of the individuals and the institutions were known, or could easily have been determined, by trial counsel. Indeed, since the appointment of current counsel less than a week ago, several witnesses have been located and interviewed, and institutional records located, many of which are apparently being shipped this week.

19. According to documents we have reviewed, current counsel for Mr. Lagrand was appointed on February 26, 1999. To my knowledge, they are the first independent counsel appointed to investigate and raise claims arising from trial counsel's performance. Newly-appointed counsel must now conduct the in-depth investigation that should have been done pre-trial. From the documents that I have reviewed and our conversations with counsel, it is clear that their investigation commenced immediately upon their appointment. Already, a range of critical witnesses have been located, and significant new facts have been revealed. Despite the passage of so many years, new counsel has apparently located documents from Mr. Lagrand's early childhood. I am informed that arrangements are also underway to interview critical witnesses. However, despite the best efforts of any counsel, a proper post-conviction investigation simply can not be conducted in a week's time. Regardless of their diligence, and regardless of the facts revealed during these preliminary inquiries, it is simply impossible to investigate, identify, document, and raise new legal claims prior to Mr. Lagrand's scheduled execution. I know of no competent mitigation specialist, investigator, or post-conviction counsel who would claim otherwise.

I declare under penalty of perjury under the laws of the United States of America and the State of Arizona that the foregoing is true and correct and that this declaration was signed this 2nd day of March, 1999.

SCHARLETTE HOLDMAN, PH.D.

Annex MG 50

AFFIDAVIT OF ROBERT HIRSH

AFFIDAVIT

STATE OF ARIZONA)
) ss.
County of Pima)

I, Robert J. Hirsh, upon my oath, depose and state as follows:

1. That I am licensed to practice in the state of Arizona and have been practicing criminal law in the state of Arizona for over 34 years;

2. That I am certified as a specialist in criminal law by the State Bar Association;

3. That my practice has consisted almost exclusively of criminal law and I have practiced extensively in state and federal courts in Tucson;

4. That I have represented numerous individuals charged with first degree murder and tried many such cases, several of them being potential capital cases;

5. That I have represented numerous capital defendants in state court Rule 32 proceedings and federal habeas proceedings, both at the trial court and appellate level;

6. That I have been qualified as an expert witness on issues relating to effective assistance of counsel in both state and federal courts;

7. That in 1994, I was consulted by attorneys for Carl LeGrand to review the LeGrand file in order to make an assessment of whether Carl LeGrand had been afforded effective assistance of counsel. At that time I became familiar with the proceedings as they related to Walter LeGrand.

8. That at the request of the federal public defender, I have reviewed materials relating to the sentencing of Walter LeGrand on September 17, 1984;

9. Based on the materials available, I believe and therefore aver that Walter LeGrand's counsel at sentencing, Bruce Burke, was ineffective at Mr. LeGrand's sentencing and fell below the minimum standard required of defense counsel at a capital sentencing;

10. In connection with the foregoing, Mr. Burke failed to have his client fully evaluated by a mental health professional prior to sentencing. Such examination should have included an opportunity for the mental health professional to review psychiatric records, pertinent police and investigative reports and additional collateral information relating to the defendant's behavior at the time the act occurred. In the instant case, Burke called Dr. David Gurland to testify at sentencing. Gurland had interviewed the defendant the year before for one hour. He had no prior psychological or psychiatric records and no police reports relating to the instant case. The purpose of Gurland's interview was for a pre-Rule 11 screening only. From the record it appeared that Gurland had little information about the offense for which the defendant was convicted;

11. Defense counsel was aware prior to sentencing that defendant had been raised in a dysfunctional family; that the defendant's upbringing was chaotic and that defendant had been physically abused early in life. Despite the indicia of defendant's mental illness, there appeared to be little attempt to psychiatrically explain the defendant's behavior at the time of the commission of the offense. Gurland's only statement as to a psychiatric assessment of the defendant was that the defendant did not appear to be psychotic at the time Gurland saw him;

12. Serious family dysfunction where the defendant has acted out as a juvenile are clearly suggestive of serious underlying mental problems. Defense counsel minimally should have had defendant re-evaluated prior to sentencing under circumstances where a psychiatrist has a full and complete understanding of the defendant's background and behavior. This would require the defense counsel to provide the psychiatrist with all available information about the case, as well as all behavioral and psychiatric records relating to defendant. Further, such a process would require defense counsel to confer with the psychiatrist about these issues prior to testifying. Based on the foregoing, it is my opinion that Bruce Burke fell below the standard of practice required of defense counsel at capital sentencing.

13. In addition to the foregoing, I note that defense counsel called only one other collateral witness, the defendant's sister, to provide further collateral information as to defendant's dysfunctional upbringing. Other witnesses were available to address this issue, as were substantial collateral records relating to the defendant's commitment to foster homes and placement at state institutions. All of the foregoing would have supported psychiatric

testimony. Based on defense counsel's failure to provide this information to the court, Bruce Burke fell below the standard of practice that is required of defense counsel at a capital sentencing.

Affiant further sayeth not.

DATED this 3rd day of March, 1999.

Robert J. Hirsh

SUBSCRIBED AND SWORN TO before me this 3rd day of March, 1999.

Notary Public

My Commission Expires:

June 5, 2000

Annex MG 51

SUPERIOR COURT OF THE STATE OF ARIZONA,
COUNTY OF PIMA,
STATE OF ARIZONA V. *WALTER LAGRAND*,
THIRD PETITION FOR POSTCONVICTION RELIEF
(2 MARCH 1999)

COPY
MAR 2 1999
PATRICIA A. NOLAND
CLERK, SUPERIOR COURT

Julie S. Hall, Bar # 017252
Office of the Federal Public Defender
97 East Congress, Suite 130
Tucson, Arizona 85701
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Counsel for Petitioner

IN THE SUPERIOR COURT OF ARIZONA IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA,) No. CR-07426
)
)
Respondent,) THIRD PETITION FOR
v.) POSTCONVICTION RELIEF
)
)
WALTER B. LAGRAND,)
)
)
) **EXECUTION SCHEDULED**
Petitioner.) **March 3, 1999**
)

Walter LaGrand is scheduled to die on March 3 for a murder committed by his brother seventeen years ago. Compelling evidence demonstrating that Petitioner's death sentence is unconstitutional exists which has never been considered by any court because Walter's trial attorney[1] failed to investigate and discover this evidence. Walter LaGrand has never had the opportunity to challenge the effectiveness of his lawyer at his capital trial, sentencing, and direct appeal because his attorney–the same attorney who rendered ineffective assistance of counsel–

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[1] To avoid confusion, Bruce Burke, who represented Walter at trial, sentencing, appeal, state and federal postconviction, and in these proceedings, will be referred to throughout these pleadings as "trial counsel."

remained his counsel of record throughout state and federal court.[2] Unless this court takes action, Walter will die having never received a fair hearing in any court on the most important issue in his case: the ineffectiveness of his trial, sentencing, and appeal counsel.

FACTS[3]

Petitioner was born on January 26, 1962, the second child of Emma Gebel.[4] His name at birth was Walter Bernhard Gebel. His mother was twenty years old. She had given birth two years earlier to Walter's half-sister, Petra Christine Gebel. Walter's half-brother, Karl Heinz Gebel, was born the year after Walter, on October 10, 1963. Emma Gebel did not marry any of the biological father's of her children. None of her children have ever met their biological father.

Walter's father, Tirso Molina-Lopez, was an American soldier stationed in Augsburg, Germany.[5] Emma met him in restaurant in Augsburg in April of 1961. She became pregnant immediately. Tirso Molina-Lopez left Germany in August of 1961. He has not been heard from since. Walter's trial counsel has made no attempt to locate, interview, or investigate the whereabouts and history of Mr. Molina-Lopez.

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[2] Respondents assertion in other pleadings that Petitioner received a hearing on his ineffective assistance of counsel claim in federal court is patently false.

[3] Some facts set forth in this petition are supported by documents which are en route to counsel and will be filed with the Court as soon as they are received. Undersigned counsel was appointed February 26, 1999. Investigation was immediately undertaken but is obviously not complete. Petitioner will move to supplement this pleading as additional facts supporting these claims are uncovered.

[4] Walter was born at St. Elisabeth Hospital in Dillingen on the Danube, Germany. The birth was attended by a Midwife named Mrs. Teichman. Walter's trial attorney never obtained his birth certificate or birth records. Nor has Mrs Teichman been located and interviewed. Trial counsel did not even know that his client was a German citizen when he represented him at his capital trial, sentencing and appeal.

[5] Information Protocol for the Purpose of Filiation, by Ros Ruder, dated February 28, 1962. Counsel did not locate or interview Ros Ruder.

Walter's mother abandoned him to the care of her mother (Walter's grandmother), Maria Gebel, immediately upon his birth. Walter's grandmother was already caring for three other infant grandchildren, Petra Christine (Walter's half-sister), Renate Gebel (Walter's cousin), and Michael Gebel (Walter's cousin). Renate and Michael were the children of Anna Gebel, Emma's sister. Like Emma Gebel, Anna did not marry the father of her two children and abandoned them to the care of their grandmother, Maria.

Maria could not care for the babies. A welfare department report completed when Walter was just three months of age describes Maria as "harsh and rough with the children." [Report Sheet Re: Visit to Ward, author I. Große (caseworker), April 3, 1962][6]. At the time of this visit, Große described the conditions of the home as "bearable." Große also notes that an older man is present who is "in on everything."[7]

One month later, Walter was hospitalized. [Report Sheet Re: Visit to Ward, author I. Große , May 16, 1962]. The report does not state why Walter was in the hospital.[8] Große notes that "The Youth Office is well aware of the domestic circumstances."[9] [Id.] Walter's mother only rarely sent money to Maria. [Id.]. Walter was returned to his grandmother's care upon discharge from the hospital.

Seven months later, Walter was hospitalized again. This time, his sister and two cousins were hospitalized as well–all due to "nutritional dystrophy" and neglect.[10] The children were admitted to Dillingen Hospital on December 19, 1962. The next day, on December 20, 1962, the children were transferred to Josefinum Children's Hospital in Augsburg where they remained until February 21, 1963. Doctor Freislederer at Josefinum Children's Hospital wrote that the grandmother's home was "unfavorable."[11] [Report of Caseworker Tiefenbacher, dated 1/18/63].[12] The doctor reported that neither the mother nor the grandmother could provide adequate care for the children. The children were lacking in "supervision", "nurture," and "care." The doctor made the following observations: "The children do not get enough to eat."; "The accommodations are extremely poor."; "The children are undernourished."; and "The children appear haggard and sickly." [Id.]

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[6] Trial counsel did not locate or interview caseworker Große.

[7] Trial counsel made no attempts to identify this man or investigate the meaning of this statement.

[8] Trial counsel made no attempts to uncover the reason for the hospitalization.

[9] Trial counsel made no attempts to investigate the meaning of this statement.

The doctor concluded that it was "insupportable and irresponsible" to leave more than two children with the grandmother.[13] The doctor recommended that the children be sent to Allgau, in the Bavarian region so that they could heal from their many physical and emotional ailments. [Id.]

The children were transferred from Josefinum Children's Hospital to Tama Recreation Home at Hindelang in the Bavarian Region on February 21, 1963. They remained there until

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[10] Trial counsel made no attempts to investigate the nature of the term "nutritional dystrophy" in Germany. However, from the context of the report, it appears to mean that these children were not being fed.

[11] Trial counsel made no attempts to locate and interview Dr. Freislederer and has not obtained the records from Josefinum Children's Hospital. Trial counsel did not identify, locate, or interview any of the staff at Josefinum Children's Hospital.

[12] Counsel made no attempt to locate and interview Caseworker Tiefenbacher.

[13] All four children were returned to the grandmother on March 30, 1963.

March 20, 1963.

Upon their discharge from the Tama Recreation Home, Sister March Utsch wrote:

> All four children developed an amazing appetite and became acclimatized to their new environment very quickly. Because of the wonderful winter weather, they were able to be outdoors almost every day and looked very well-rested, when the case worker from Dillingen picked them up. However, there was a heart-wrenching scene, when the four children were put into the car and none of them wanted to leave. They let out ear-splitting screams and tried to get out of the car by pushing against the windows. To console them, I placed a large teddy bear into the car, which took their minds off their departure a bit. ... If you ever get children as wretched as these again – we now have enough room to take them in.

Letter from Sister Martha Utsch to Dr. Freistederer.[14] All four children were returned to their grandmother, Maria.

Karl Heinz LaGrand was born on October 10, 1963. He was immediately placed in a children's home. Petra was three years old, Walter was a year and a half. Karl would not meet his brother and sister until late 1966. At the time of Karl's birth, Emma was living with Xaver Stehle in Augsburg.[15] [See Exhibits 1-20].

Eight months after being discharged from the Tama Recreation Home, Renate Gebel was hospitalized again for nutritional dystrophy. Maria repeatedly requested help from her two daughters because she could not care for the children. [Caseworkers Report, I. Große, dated December 12, 1963]. Neither Emma nor Anna gave her any help.

On January 31, 1994 (five days after Walter's second birthday), the children were placed in a children's home because Maria was unexpectedly hospitalized and the children were left with no one to care for them. Four days later Emma Gebel was contacted by the District Youth Office and told that her children had been placed in a children's home. Emma responded that she wanted the children left there. [See Exhibits 1 through 20].

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[14] Counsel made no attempt to locate and interview Sister Utsch or any of the other nuns at the Tama Recreation Home.

[15] Counsel did not locate or interview Xaver Stehle.

Two stories were told about why Maria was hospitalized. Maria's daughter, Anna, said that her brother (Walter's uncle), Oswald Gebel, came home drunk and beat up their mother.[16] Katharina Matt–Emma and Anna's sister–and Maria deny this story. They explain that Maria somehow broke her hip.[17] [Id.]

Criminal charges were filed against Anna for leaving the children without supervision when Maria was hospitalized.[18] According to Public Guardian Rieder, the children were starving and had inadequate clothes when the social worker, Miss Stetter, went to pick them up. Anna had left the children (the oldest child, Petra, was only three years old) alone in the apartment.[19] [Id.]

On February 17, 1964, all four children (Petra, Renate, Michael and Walter) were placed in the temporary custody of the Social Welfare Department and placed in a children's home. The children stayed in the Children's Home at Wittislingen for two and a half years, from January 31,

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[16] Trial counsel did not locate or interview Oswald Gebel.

[17] Trial counsel did not locate or interview Katharina Matt.

[18] The outcome of criminal charges is not known. Trial counsel did not obtain copies of the court records or police reports relating to this incident. Anna Gebel was not located or interviewed.

[19] Trial counsel did not locate or interview Rieder or Miss Stetter.

1964 until July 27, 1966.[20] In the meantime, Karl was living in a home for infants in Augsburg. The temporary placement order was made permanent on June 25, 1964. [Id.]

On August 12, 1965, Emma requested permission to take Walter and Petra to a United States Military physician, Capt. Hollister S. Harrison.[21] Emma stated that she was to marry Masie Lagrand, an American soldier stationed in Augsburg. Mr. Lagrand intended to marry Emma and adopt her three children. Miss Wirth from the social welfare office accompanied the children to the examination and returned them to the children's home.[22] [Id.]

Seven months later, on March 18, 1966, Emma Gebel married Masie Lagrand. The wedding took place before a magistrate.[23] Three months later, on June 16, 1966, Emma Lagrand sent a letter to the court requesting custody of Petra and Walter. She had already obtained custody of Karl. She wished to take all three of her children to the United States. Her husband Masie intended to adopt the children. Ms. Lagrand signed her name, Anna Lagrand–the name of her sister. [Id.]

On June 20, 1966, a report from the Children's Home described Walter as "full of life", "boisterous", "good-natured", "easy-going", and "generally well-liked by the other children." The Gebel children were "very attached to each other" and "a pleasure to have around." [Id.]

On July 27, 1966, the court entered an order returning custody of Walter and Petra to

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[20] Trial counsel did not obtain records from the children's home, and did not interview any of the workers there.

[21] Trial counsel did not obtain the records from this evaluation and did not locate or interview Dr. Harrison.

[22] Trial counsel did not locate or interview Miss Wirth.

[23] Trial counsel did not obtain the marriage certificate.

Emma Lagrand. [24] On October 19, 1966, the Social Welfare office in Germany closed its file on the Gebel children. [Id.]

Sometime between July, 1966 and January 1967, Masie Lagrand adopted Petra, Walter, and Karl. The family moved to the United States in January of 1967. Walter was almost five years old. [Id.]

Soon after the family was transferred to the United States, Masie Lagrand was ordered to report for duty to fight in Viet Nam.[25] Masie Lagrand's war time experience apparently had a dramatic and tragic effect on him psychologically. After returning from the war, he drank heavily, could not sleep, and had terrible nightmares.[26] Mr. Lagrand was extremely violent. He beat the boys often for minor transgressions. When the boys would run away to escape the terror of their home life, preferring to sleep on park benches, Mr. Lagrand would beat them again.

Masie and Emma's marriage deteriorated significantly and both started having extra marital affairs. This severely unstable and dysfunctional family was under increasing stress when Masie was transferred back to Germany. Emma and the children remained in Arizona. When Mr. Lagrand came home from Germany, he and Emma had difficulties at once, resulting in a violent argument. Mr. Lagrand returned to Germany. Two months later, in December of 1973, Emma took the children to Germany to live with Masie. After they arrived, they found that Masie was living with another woman in Germany and had children from that relationship. Mr. Lagrand continued to beat Walter and Karl in Germany.

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[24] The court order refers to an inquiry into the community regarding Emma Lagrand. Counsel did not attempt to locate or gather records regarding this inquiry.

[25] Masie Lagrand's experiences in Viet Nam are not known because counsel did not attempt to locate or interview him. Counsel did not attempt to obtain Mr. Lagrand's military file.

[26] All of these symptoms are characteristic of Viet Nam Vet's syndrome, now, post traumatic stress disorder.

Six months later, Emma moved back to the United States with her children. She blamed the boys for the demise of her marriage. Mr. Lagrand divorced Emma, claiming that he had never adopted the children. Masie Lagrand had been the only father figure in the children's lives and they were devastated by his rejection of them. Masie Lagrand has not had any contact with the family since this time.

None of these facts have ever been presented in any meaningful way to any court who has considered Walter's case.

ARGUMENT

I. This Petition Is Properly Presented And Must Be Considered On The Merits.

Petitioner has never before had an opportunity to litigate his ineffective assistance of counsel claims. Petitioner was represented at trial and sentencing in his capital case by Bruce Burke. Mr. Burke continued to represent Petitioner throughout the direct appeal and first state postconviction proceedings, throughout all federal habeas corpus proceedings, and has thus far continued to represent Petitioner in his second state postconviction proceeding. At no point was co-counsel appointed to assist Mr. Burke in the representation of Petitioner.

While Petitioner's case was pending in federal district court, that court recognized the serious concerns raised by such continuing representation in a capital case. Only when the court raised these concerns with Mr. Burke was Petitioner informed that the continuing representation was preventing Petitioner from investigating claims that his counsel had been ineffective at trial, during sentencing, and on appeal. Without obtaining for Petitioner the advice of conflict free counsel, Mr. Burke advised Petitioner to reject the district court's offer to appoint new counsel.

Despite the fact that Mr. Burke admitted he could not be objective about his own performance and that Petitioner had no legal training or skills, the court accepted Mr. Burke's sealed status report stating that Petitioner did not want new counsel appointed. The court did not obtain a personal or written waiver from Petitioner, or appoint conflict free counsel to advise him.

When investigation by Petitioner's codefendant, Karl Lagrand, uncovered additional evidence of Karl's attorney's ineffective assistance at sentencing, Mr. Burke learned that his advice to Petitioner was obviously wrong. He moved to withdraw as counsel for Petitioner. The district court unsealed the Status Report filed by Mr. Burke and denied counsel's motion. The Ninth Circuit subsequently affirmed the decision not to appoint new counsel in federal court. No independent inquiry of Petitioner was made by either court.

Petitioner never made a waiver of his right to effective assistance of counsel. Until February 25, 1999, the only person to advise petitioner about his ineffective assistance of counsel claims was Mr. Burke. Mr. Burke had not allowed any other attorney to speak with his client until that time. Mr. Burke has an actual conflict of interest and can not objectively evaluate his services. Petitioner is not skilled in the law and did not understand the nature of his ineffective assistance claims, the consequences of not raising those claims, and the viability of those claims.

On February 25, 1999, Mr. Burke authorized undersigned counsel to meet with petitioner. For the first time, Petitioner had the opportunity to consult with conflict-free counsel. As a result, Petitioner wishes to pursue his claims relating to the ineffective assistance of his prior counsel.

II. Walter Lagrand Received Ineffective Assistance of Counsel at His Capital Trial, Sentencing, and on Direct Appeal

Mr. Burke's numerous errors and omissions in his representation of Walter Lagrand resulted in a denial of Walter Lagrand's rights to effective assistance of counsel under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the Arizona Constitution.[27]

The instances of ineffective assistance of counsel include, but are not limited to, failure to adequately investigate evidence of innocence and mitigation supporting a life sentence, and failure to raise meritorious issues at trial and on direct appeal.

Although undersigned counsel was just appointed and investigation into these claims just begun, at least one instance of ineffective assistance of trial and appellate counsel is readily apparent from the record. Trial counsel failed to object to the unconstitutional method of execution imposed at Petitioner's sentencing. On appeal, this same counsel failed to raise that issue as well. In Petitioner's codefendant's case, the Ninth Circuit granted relief on the basis that execution by lethal gas violates the United States Constitution. Lagrand (Karl) v. Stewart, No. 99-99004, Order and Opinion (9Th Cir. February 24, 1999). Petitioner is similarly situated and is entitled to a new sentencing because the execution of his sentence cannot be constitutionally carried out.

Trial Counsel was also ineffective for failing to adequately investigate evidence of Petitioner's actual innocence of the crime and of his capital sentence. Walter Lagrand has always maintained that he was not present when his brother killed the victim. Karl Lagrand's confessions to law enforcement officers and others have consistently confirmed Walter's testimony. However, the courts have thus far rejected Walter and Karl's consistent account that Karl acted alone and impulsively, even though the Arizona Supreme Court recognized that evidence corroborating Karl's confessions certainly exists. State v. Lagrand, 734 P.d. 563, 571 (1987)("Evidence both corroborating and contradicting Karl's statements exists.")

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[27] Undersigned counsel was appointed to represent Petitioner in federal court on February 26, 1999. As a result, counsel has had almost no opportunity to review the record in this case or to conduct any investigation on behalf of Petitioner in the days since their appointment. Even a cursory review of the few available documents in the case demonstrates that meritorious claims of ineffective assistance of counsel exist. Investigation is ongoing and these claims will be supplemented as new facts are discovered.

Walter Lagrand was convicted on a general verdict of first degree murder. It is not known if the jury convicted him of premeditated murder or felony murder. The sentencing court found pecuniary gain and that the murder was especially cruel, heinous, or depraved and that Walter's participation in the crime made him eligible for the death penalty pursuant to Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368 and Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676 (1987).. All of these findings rest on a credibility dispute between Karl Lagrand's confessions coupled with Walter Lagrand's testimony versus the testimony of Dawn Lopez. If the court found that Karl Lagrand acted impulsively and alone then the murder is not premeditated, was not in furtherance of the robbery, was not for pecuniary gain, the mental element necessary for the especially cruel, heinous, and depraved aggravating circumstance was not met, and Walter Lagrand is not even eligible for the death penalty under Enmund/Tison.

Trial counsel was aware of the crucial significance in this testimony. Yet, his only attempt to discredit Dawn Lopez's testimony was to call an expert in the area of the effects of stress on memory. Inexplicably, counsel did not obtain an independent crime scene expert to assist in reviewing the physical evidence. Competent counsel would have conducted an independent investigation to compare the physical evidence with the testimony of Dawn Lopez and Walter Lagrand to demonstrate the veracity of Walter and Karl's version of events. In addition, competent counsel would have investigated Karl's mental health background. Had he done so, he would have learned that Karl did have a character trait for impulsivity which also would have corroborated Walter and Karl. See State v. Christensen, 129 Ariz 32, 35, 628 P.2d 580, 583 (1981). See also State v. Ortiz, 158 Ariz. 528, 533, 764 P.2d 13, 18 (1988)(expert testimony concerning defendant's tendency to act without reflection relevant to first degree murder charge where defendant shot ex-wife several times, then followed her when she crawled under a car, talked to her and shot her again); Vickers v. Ricketts, 798 P.2d 369, 373 (1986)(expert testimony about impulsive behavior caused by temporal lobe epilepsy is probative of lack of premeditation where defendant strangled victim, punctured victim's body a dozen times, and carved "Bonsai" in victim's back); Dumas v. State, 111 Nev. 1270, 903 P.2d 816 (1995)(trial counsel ineffective for failing to present cogent mental incapacity defense).

Some of this investigation has been conducted since the time of trial, but not by counsel for Walter Lagrand. Investigation is ongoing.

Given sufficient time, undersigned counsel believes evidence will be uncovered which will prove that Karl acted alone and impulsively. This was not a murder in the furtherance of a robbery. The robbery was aborted. This was not a murder for pecuniary gain. The brothers knew they would get no money. Walter did not possess the mental state necessary to establish the especially cruel, heinous, or depraved aggravating circumstance and the mental state of the killer, his brother Karl, cannot be transferred to him. Most importantly, counsel believes that additional investigation will show that the facts do not, and cannot, support the trial court's finding that Walter attempted, intended, or did kill beyond a reasonable doubt. This means that

Walter is not even eligible for the death penalty.

Petitioner was prejudiced by his trial counsel's ineffectiveness and inability to adequately confront the state's case, and establish that he did not premeditate or intend to kill the victim, and that his brother Karl who was tried jointly with him did not premeditate the crime or intend to kill the victim. See e.g., State v. Christensen, 12 Ariz. At 33-34, 628 P.2d at 581-82 (expert testimony of impulsivity should have been admitted where defendant confessed to killing wife, stated that he hit her after heated argument with bottle, laid down next to her for "an undetermined time," and "choked her with his hands"; victim's body found under bed had sustained two severe head wounds, numerous small abrasions and lacerations and had ligature of twine around her neck); State v. Lacquey, 117 Ariz. 231, 571 P.2d 1027, 1030 (1977)(because death of victim who was bruised all over chest, back, legs and thighs, strangled, sustained nine fractured ribs, lacerated liver and hemorrhaged brain was result of "random violent and indiscriminate attack upon victim" and not premeditation, first degree murder reduced to second degree murder).

Petitioner's court appointed counsel's failure to effectively represent him regarding these issues denied him his rights under the Sixth, Eighth, and Fourteenth Amendments.

Trial counsel was also ineffective because he failed to properly investigate substantial and compelling evidence supporting a life sentence and did not properly attack the aggravating circumstances. Counsel in a capital case has an obligation to investigate his client's background, character, and circumstances of the crime. Here, no meaningful mitigation investigation was conducted. The mental health "evaluation" conducted by Dr. Gurland consisted of a one-hour interview of Walter Lagrand and a review of presentence reports. Dr. Gurland did not have any collateral source information. Dr. Gurland was in no position to offer meaningful testimony to the court. Although counsel called Petitioner's sister to testify, she could not provide many of the relevant material facts because she was too young to recall the events.

The evidence outlined above is evidence which should have been discovered during the pretrial investigation in this case, and is but a glimpse into the severely dysfunctional and abusive family into which Walter was born and raised.[28] Competent counsel in a capital trial would have conducted an adequate investigation. This evidence is relevant because trauma experienced during childhood leads to crippling lifelong mental instabilities which often lead to unfortunate tragedies such as the one here. State v. Trostle, 951 P. 2d 869 (AZ. 1997). Evidence that Walter suffered from malnutrition, isolation, neglect, and torture throughout his childhood are all relevant to a proper determination of the sentence. In addition, counsel's failure to produce any evidence relevant to Walter's positive character traits, e.g., the fact that he was a loving, boisterous child who was a pleasure to be around, constitutes ineffective assistance of counsel.

All of this evidence is needed to obtain an accurate mental health profile of the person being sentenced. The evidence uncovered shows a very different picture of Walter Lagrand.

Critical investigation has never been conducted because of the continued representation by trial counsel whose representation is being challenged. The evidence in this petition alone is sufficient to grant a stay of execution. However, this evidence only scratches the surface. Counsel has not had time to conduct any but the most minimal investigation in this case. Given additional time, counsel believes that even more evidence establishing Petitioner's innocence of the first degree murder charge and capital sentence will be uncovered. Petitioner's execution must be stopped.

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[28] As late as last week counsel did not even know some of the basic facts about his clients life history. For example, in the second post conviction petition, Mr. Burke proffers that his client's **biological** father was black and that as a teenager he had a blonde afro. Walter Lagrand's father was Puerto-Rican. Walter Lagrand has black hair.

Petitioner was prejudiced by counsel's ineffectiveness because he received a death sentence when the presentation of the readily available evidence would have rebutted the aggravating circumstances, and established mitigating evidence warranting a life sentence. Counsel's failure to conduct a proper investigation of Petitioner's background and social history not only precluded the presentation of this evidence as independent mitigation, it also compromised the ability of his, and the State's mental health experts to make competent and accurate diagnoses. Caro v. Calderon, 1999 WL 6573 (1999); Hendricks v. Calderon, 70 F.3d 1031, 1044 (9th Cir. 1995); Wade v. Calderon, 29 F.3d 1312, 1323 (9th Cir. 1994).

Trial counsel was also ineffective for failing to raise the Vienna Convention issue at trial or on direct appeal. Trial counsel did not even know that his client was a German citizen for the first ten years that he represented him. Walter Lagrand had no way of knowing that his German citizenship was of any relevance to the proceeding. Had Mr. Lagrand been informed of his rights under the Vienna Convention, the German Government would have become involved in the investigation of his case and assisted counsel in uncovering the important evidence outlined above and in conducting the additional necessary investigation which has yet to be performed. Trial counsel's failure to raise this claim at trial and on appeal resulted in a finding of preclusion on these claims which may prevent this Court from a review of this claim on the merits.

Trial counsel's professional errors prejudiced petitioner. Evidence relating to his innocence of the crime and his capital sentence have never been presented. Petitioner was prejudiced as a result. Trial counsel failed to raise a meritorious claim that execution by lethal gas is unconstitutional and as a result, Petitioner is about to be executed in an unconstitutionally cruel and unusual manner. Given additional time–more than the two days afforded undersigned counsel–other substantial constitutional errors will be uncovered. This court must act now to prevent this grave injustice.

III. Counsel Must Be Appointed to Investigate and Amend This Petition

Petitioner needs counsel who can ethically represent him at this stage of the proceedings. Petitioner has been incarcerated on Arizona's death row since 1984. He has no legal training. He is incapable of conducting the factual and legal investigation and research necessary to proving ineffective assistance of trial, sentencing, and direct appeal counsel. As the United States Supreme Court recognizes, a person untrained in the law is generally unable to evaluate their counsel's performance. Kimmelman v. Morrison, 477 U.S. 365 (1986). Thus, it is not surprising that criminal defendants usually are unaware that they have received ineffective assistance until they have consulted with a different lawyer. Id; United States v. Cronic, 466 U.S. 648, 657 n.21 (1984)(because the constitutional standard of effectiveness is focused on the adversarial process, "we attach no weight to either [the client's] expression of satisfaction with counsel's performance at the time of his trial, or to his later expression of dissatisfaction"). Until February 25, 1999, Petitioner has never had the opportunity to consult with a lawyer other than Mr. Burke about Mr. Burke's representation. Prior to that time, Petitioner could not have evaluated the quality of Mr. Burke's representation because he had no legal advice from an attorney who could ethically advise him regarding issues of ineffective assistance of counsel and he had no ability to research and investigate those issues himself. In fact, Mr. Burke told

Petitioner that he knew of nothing that would support a claim of ineffectiveness. Lagrand v. Lewis, No. CIV 92-217-TUC-WDB, Status Report (D.Ariz. May 15, 1992).

Mr. Burke could not and cannot challenge his own effectiveness. State v. Marlow, 163 Ariz. 65, 68, 786 P.d. 395, 398 (1989). Mr. Burke candidly admitted to the district court in his motion to withdraw that his judgment in advising Petitioner to waive the appointment of independent counsel in federal court was prejudiced by the conflict under which he operated. Arizona recognizes that such a conflict is impermissible, even in noncapital cases. State v. Suarez, 137 Ariz. 368, 670 P.d. 1192 (App. 1983). The Ninth Circuit agrees. Deutscher v. Angelone, 16 F.3d 981 (9th Cir. 1994).

Under these extraordinary circumstances, the appropriate remedy is to stay the execution and appoint new counsel to represent Petitioner. Because Petitioner's counsel is unable to represent him at this stage of proceedings, Petitioner is currently without counsel. In capital cases in which a defendant has never had conflict free counsel but, after consulting with conflict free counsel for the first time, expresses his intent to raise a claim of ineffective assistance of counsel, this Court must act to protect defendant's important right to the effective assistance of counsel under the Fifth, Sixth, Eighth, and Fourteenth Amendment to the United States Constitution. See State v. Greenawalt, No. CR-79-4616-AP, Order, January 14, 1993 (because "issue of ineffective assistance of counsel has not previously been raised in this case" and new counsel has been appointed, stay of execution granted); State v. Carriger, No. CR-82-4457-AP/PC, Order, October 20, 1993 (in petition raising claim of ineffective assistance of counsel at sentencing for first time, stay granted to permit completion of Rule 32 proceedings); see also State v. Walton, 159 Ariz. 571, 591, 769 P.d. 1017, 1037 (1989)(where ineffective assistance claim will be raised, court should appoint new counsel for subsequent proceedings).

Petitioner must now be represented by counsel who can "objectively review" and "zealously argue" a claim of ineffective assistance of counsel. See Suarez, at 380, 670 P.d. at 1204.

CONCLUSION

For the foregoing reasons and on the basis of the facts and authorities cited, the amended petition for postconviction relief should be granted and Petitioner's death sentence should be vacated. Alternatively, the petition should be stayed and sufficient time allowed undersigned counsel to investigate these substantial claims that could not have been investigated before.

Respectfully submitted this 2nd day of March, 1999.

Julie S. Hall

Fredric F. Kay
Federal Public Defender
Julie S. Hall
97 E. Congress, Ste. 130
Tucson, AZ 85701

Copy of the foregoing faxed
this 2nd day of March, 1999 to:

Diane Ramsey
Assistant Attorney General
1275 W. Washington
Phoenix, Arizona 85007
fax (602) 542-4849

EXHIBIT 1

Affidavit

The undersigned certifies herewith, that the foregoing document is an accurate and equivalent translation from the German-language original, to the best of her knowledge and ability.

Karin Isbell, 02/14/94

Karin Isbell, M.A.
Court Interpreter & Translator
Accredited Member,
American Translators Association
Member, Arizona Court Interpreters Assoc.

STATE OF ARIZONA) ss.
COUNTY OF MARICOPA)
This instrument was acknowledged before me this 14th day of [illegible] by Karin Isbell
In witness whereof I hereunto set my hand and official seal.
[illegible] NOTARY PUBLIC
My commission expires [illegible]

Affidavit

The undersigned certifies herewith, that the foregoing document is an accurate and equivalent translation from the German-language original, to the best of her knowledge and ability.

Karin Isbell 2/28/94

Karin Isbell, M.A.
Court Interpreter & Translator
Accredited Member,
American Translators Association
Member, Arizona Court Interpreters Assoc.

STATE OF ARIZONA } ss.
COUNTY OF MARICOPA }
The instrument was acknowledged before me this 28 day of
[illegible], 19 94, by Karin Isbell
In witness whereof, I hereunto set my hand and official seal.
NOTARY PUBLIC
My Commission Expires July 31, 1996

District Youth Welfare Office 03/20/61-07/29/61
Public Guardianship
Dillingen/Danube

File Re: II/6 -

Information-Protocol
for the Purpose of Filiation

taken down by Ros Ruder

in the presence of child's mother Gebel, Emma
born 08/22/1941 in Ronsberg/CSR Occupation: unskilled worker
residing at Weisingen, 88 1/2

Reference: Public Ward Gebel, Walter Bernh.
born 01/26/62
residing in Weisingen with grandmother

1. a) Child's father's name, date and place of birth, occupation, address, employer, and income:
Molina Tirso Lopez, born 09/29/40
Service# US-156-663

b) Child's father's location during, shortly prior to, or after [next word faded out]:
Augsburg - Sheridan-Barracks. Returned to America presumably in August, 1961

2. When and where did child's mother first meet him?
April '61 at the Hochhaus Restaurant, #241 Maximilianstr., Augsburg

3. When and where did the first sexual intercourse occur?
In a guest-room of the Thalia Hotel

4. Did subsequently intercourse take place frequently?
Yes.

5. When was the last time? ______

6. When did the child's mother have her last monthly period?
On 03/24/61

7. During which intercourse could conception have occurred?
Unknown.

8. More detailed information about the intercourse:
a) Place?-------------
b) With or without contraceptive? Without.

9. Did child's mother notify child's father of her pregnancy, and if so, when?
Yes, in the end of April, 1961

10. How did the child's father react?
He acknowledged his paternity and wanted to marry me.

11. Has he acknowledged his paternity in any letter or in the presence of witnesses?
   a) Letter:------------
   b) Names and addresses of witnesses:

12. Are there any other individuals who could provide information about said intimate relationship? ---------

13. Did child's mother have sexual intercourse with other men during the critical time-period (legal gestation period and/or shortly before or thereafter)?
No.

14. Where was the child born (in an institution or at home)?
At St.Elisabeth Hospital, Dillingen

15. Specific information by child's mother (child's weight and length; his development status)
=================================

16. a) Name of Midwife attending to birth?
   Mrs. Teichmann
   b) Attending physician?
   ==============================

I herewith release Midwife and/or medical physician from any professional confidentiality: I do.

17. Will child's mother agree to the taking of a blood sample for the purpose of a blood-type test? Yes.

18. Does child's mother have other illegitimate children? [✓ yes]/no
(If so: child's name, date and place of birth, child's father, guardianship court): Petra Christine, 07/21/1960.

I will affirm the information given by me at any time under oath before a court of law. I am aware of my responsibility to notify the District Youth Welfare Office immediately of any change in residence or of whereabouts.

I will also provide immediate notification in the case of any change in regard to my child's accommodations.

Dillingen , February 28, 1962

Taken down by: [signed:] Emma Gebel
(Signature of child's mother)

Az.: II 6 -

Informations-Protokoll

zur Feststellung der Vaterschaft

aufgenommen durch Pol. Riedler
mit der Kindesmutter Gebel Emmika
geb. am 22.8.1941 in Raumberg/ČSR Beruf: Hilfsarbeiterin
wohnhaft in Weißingen 88½
Betreff: Amtsmündel Gebel Wally Beruk
geb. 26.1.62
wohnhaft Weißingen bei der Großmutter

1. a) Name, Geburtszeit u. -Ort, Beruf, Anschrift, Arbeitgeber und Verdienst des Kindesvaters:
Molina Tirso Lopez geb. 29.9.40
Service#. US-156 683 geb. 29.9.40 nach Amerika zurück seit August 1961

b Aufenthaltsverhältnisse des Kindsvaters während bzw. kurz vorher oder nachher:
Augsburg - Sheridan - Kaserne

2. Wann und wo lernte die Kindesmutter ihn kennen:
Augsburg im April 61 beim Gasthaus Lochhaus

3. Wann und wo kam es zum ersten Geschlechtsverkehr Maximilian
Italia-Hotel Augsburg im Fremdenzimmer

4 Kam es in der Folge des öfteren zum Verkehr?
ja

5. Wann war der letzte Verkehr?

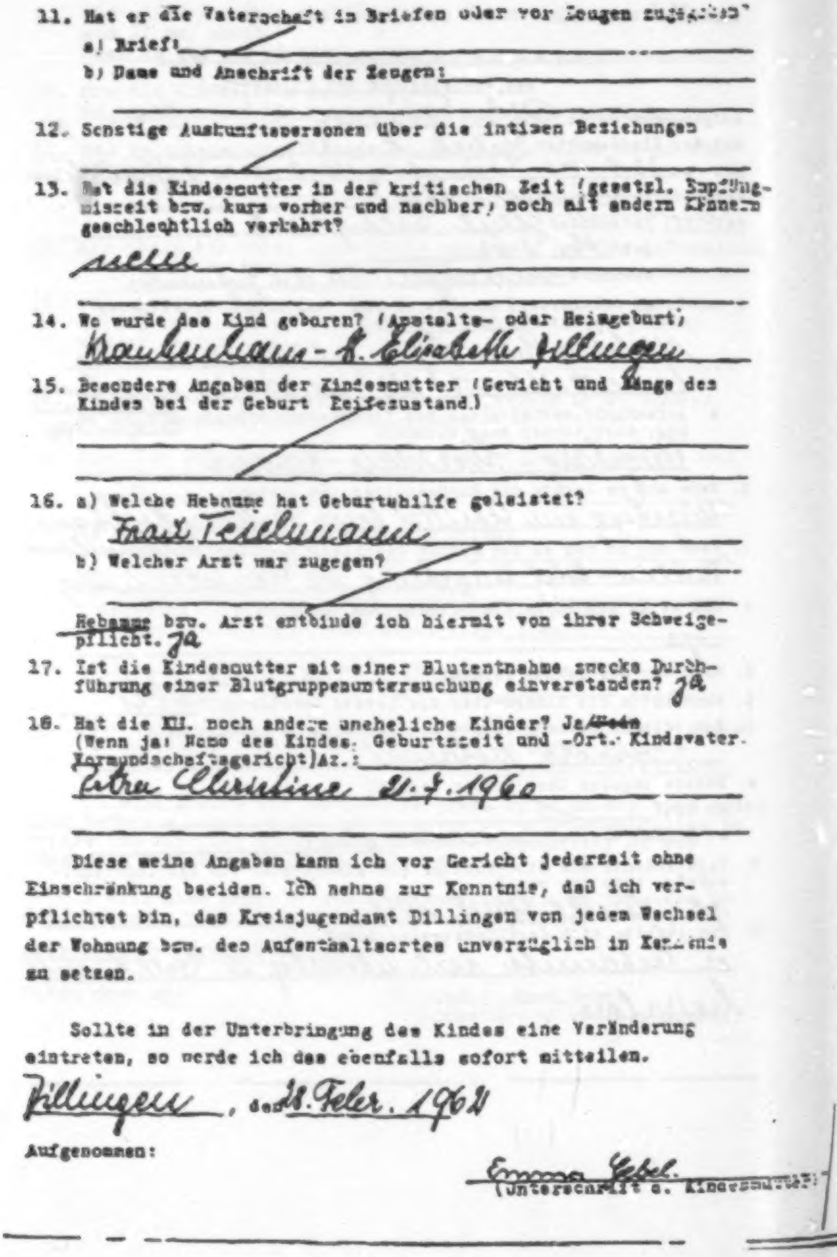
6. Wann hatte die Kindsmutter die letzte Monatsregel? 24.2.61

7. Bei welchem Verkehr dürfte die Empfängnis erfolgt sein?
nicht bekannt

8. Nähere Angaben über diesen Verkehr:
a) Ort? /
b. Normal oder mit Schutzmittel? ohne

9. Verständigte die Kindesmutter den Kindesvater von der Schwangerschaft, wenn ja, wann?
ja, Ende April 1961

10. Wie stellte sich der Kindesvater dazu?
er bekannte sich als Vater u. wollte mich heiraten.



11. Hat er die Vaterschaft in Briefen oder vor Zeugen zugegeben?
a) Brief:
b) Name und Anschrift der Zeugen:

12. Sonstige Auskunftspersonen über die intimen Beziehungen

13. Hat die Kindesmutter in der kritischen Zeit (gesetzl. Empfängniszeit bzw. kurz vorher und nachher) noch mit andern Männern geschlechtlich verkehrt?
nein

14. Wo wurde das Kind geboren? (Anstalts- oder Heimgeburt)
Krankenhaus-St. Elisabeth Dillingen

15. Besondere Angaben der Kindesmutter (Gewicht und Länge des Kindes bei der Geburt Reifezustand.)

16. a) Welche Hebamme hat Geburtshilfe geleistet?
Frau Teichmann
b) Welcher Arzt war zugegen?

Hebamme bzw. Arzt entbinde ich hiermit von ihrer Schweigepflicht. ja

17. Ist die Kindesmutter mit einer Blutentnahme zwecks Durchführung einer Blutgruppenuntersuchung einverstanden? ja

18. Hat die KM. noch andere uneheliche Kinder? Ja ~~Nein~~
(Wenn ja: Name des Kindes, Geburtszeit und -Ort, Kindsvater, Vormundschaftsgericht) Az.:
Petra Christine 21.7.1960

Diese meine Angaben kann ich vor Gericht jederzeit ohne Einschränkung beeiden. Ich nehme zur Kenntnis, daß ich verpflichtet bin, das Kreisjugendamt Dillingen von jedem Wechsel der Wohnung bzw. des Aufenthaltsortes unverzüglich in Kenntnis zu setzen.

Sollte in der Unterbringung des Kindes eine Veränderung eintreten, so werde ich das ebenfalls sofort mitteilen.

Dillingen, den 28. Febr. 1962

Aufgenommen:

Emma Gebel
(Unterschrift d. Kindesmutter)

EXHIBIT 3

File Re: II/4-432/27-1578 [Stamp:] Rural District Office
Dillingen/Danube
Recd.-April 9,1962
Section II/4

Rural District Dillingen/Danube
District Youth Welfare Office

[Stamp:] Rural District Office
Dillingen/Danube
Recd. Dec. 3,1963

[Third stamp illegible]

(Guardian Court__________
File Re.__________)

Report Sheet Re. Visit to Ward

Ward:	Mother: & Father:
Gebel, Walter Bernhard	Gebel, Emma
born 01/26/1962	born 08/22/1941
in Dillingen/Danube	in Ronsberg/CSR
Religion: Roman Catholic	Religion: Roman Catholic
Citizenship: German	Citizenship: German
Siblings:	[Marital status:] Single
	Occupation: domestic help
	Residence: Weisingen 88 1/2
	Married since:
	To :
At current residence since: Birth	
Living with: Mother & grandmother	
Name & address of Guardian:	

Request f. Permission to Report

submitted by assigned Family Case Worker w/request to call on ward & prepare report.

Dillingen/Danube
02/20/1962

By order of
[Initials]

Case Worker's Report

Ward was visited on 04/03/1962.
Address: as above
Care:
Nurture:
Occup.:
Mental developmt:
Moral conduct:
Physical developmt:
Rcvd.any estate?:
Misc./suggestions:

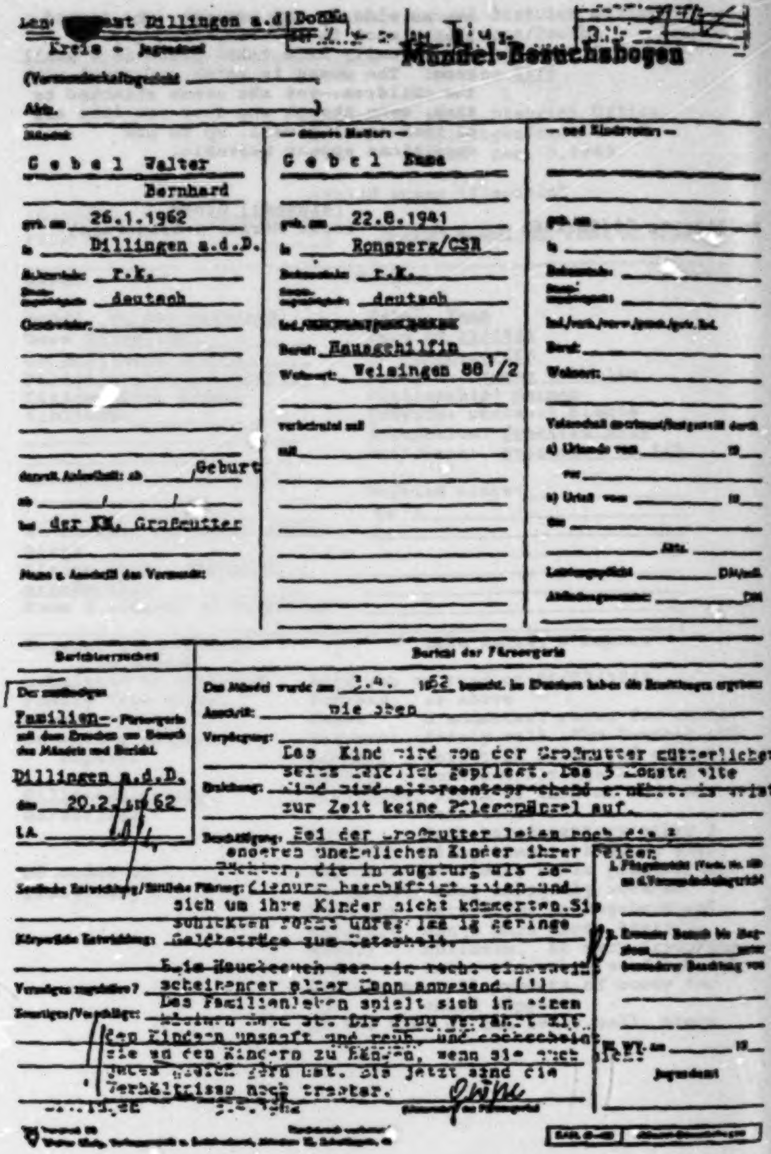
Grandmother cares for child fairly well. The 3-month-old infant is being fed commensurate w/his age & shows no signs of lack of care at this time.

Both her daughters' other 3 illegitimate children also live with their grandmother. They allegedly work as waitresses in Augsburg and don't care about their children. At very irregular intervals, they send her very small amounts of money for child support.

At the time of the house-call, there

was an elderly man present, who seemed pretty much in on everything (!) Their family life takes place in a small room. The woman is harsh and rough with the children--yet she seems attached to them, even though she does not like all of them equally well. Up to now conditions appear bearable.

[signed:] Große
Dillingen, 04/03/1962 (Case Worker's signature)



Lan[illegible]amt Dillingen a.d. Do[illegible]

Kreis - Jugendamt

(Vormundschaftsgericht ______

Aktz. ______)

Mündel-Besuchsbogen

Mündel:	— dessen Mutter: —	— und Kindsvater: —
G e b e l Walter Bernhard	G e b e l Emma	
geb. am 26.1.1962	geb. am 22.8.1941	geb. am
in Dillingen a.d.D.	in Ronsperg/CSR	in
Bekenntnis: r.k.	Bekenntnis: r.k.	Bekenntnis:
Staatsangehörigkeit: deutsch	Staatsangehörigkeit: deutsch	Staatsangehörigkeit:
Geschwister:		led./verh./verw./gesch./getr. leb.
	Beruf: Hausgehilfin	Beruf:
	Wohnort: Weisingen 88 1/2	Wohnort:
	verheiratet mit	Vaterschaft anerkannt/festgestellt durch
	mit	a) Urkunde vom ______ 19__
derzeit. Aufenthalt: ab Geburt		vor
ab / /		b) Urteil vom ______ 19__
bei der KM. Großmutter		des
		Aktz.
Name u. Anschrift des Vormunds:		Leistungspflicht ______ DM/mtl.
		Abfindungssumme: ______ DM

Berichtsersuchen

Der zuständigen Familien- Fürsorgerin mit dem Ersuchen um Besuch des Mündels und Bericht.

Dillingen a.d.D., den 20.2.1962

I.A.

Bericht der Fürsorgerin

Das Mündel wurde am 3.4. 1962 besucht. Im Einzelnen haben die Ermittlungen ergeben:

Anschrift: wie oben

Verpflegung: Das Kind wird von der Großmutter mütterlicherseits [illegible] gepflegt. Das 3 Monate alte

Erziehung: Kind wird altersentsprechend ernährt. Es weist zur Zeit keine Pflegemängel auf.

Beaufsichtigung: Bei der Großmutter leben noch die 3 anderen unehelichen Kinder ihrer Tochter, die in Augsburg als Be-

Seelische Entwicklung/Sittliche Führung: dienung beschäftigt seien und sich um ihre Kinder nicht kümmerten. Sie schickten jedoch unregelmäßig geringe

Körperliche Entwicklung: Geldbeträge zum Unterhalt.

Beim Hausbesuch war ein recht einfach

Vermögen angefallen? scheinender älter Mann anwesend (!)

Bemerkungen/Vorschläge: Das Familienleben spielt sich in einem kleinen Raum ab. Die Frau verfährt mit den Kindern unsanft und rauh, und anscheinend [illegible] sie an den Kindern zu hängen, wenn sie auch jedes [illegible] gern hat. Bis jetzt sind die Verhältnisse noch tragbar.

Unterschrift der Fürsorgerin

1. Pflegeerlaubnis

2. Erneuter Besuch bis

besonderer Beachtung von

3. WV. am ______ 19__

Jugendamt

EXHIBIT 4

File Re:II/4-432/27-1578 [Stamp:] Rural District Office
Dillingen/Danube
Recd.-May 16, 1962
Section II/4

Rural District Dillingen/Danube
District Youth Welfare Office

Dillingen/Danube

(Guardian Court
File Re.)

Report Sheet Re. Visit to Ward

Ward:

Gebel, Walter Bernhard
born 01/26/1962
in Dillingen/Danube
Religion: Roman Catholic
Citizenship: German
Siblings:

At current residence since:
Birth
Living with:

Name & address of Guardian:

Mother: **& Father:**

Gebel, Emma
born 08/22/1941
in Ronsberg
Religion: Roman Catholic
Citizenship: German
[Marital status:] Single
Occupation: None
Residence: Weisingen 68 1/2

Married since:
To :

Request f.Permission to Report

submitted by assigned Family Case Worker w/request to call on ward & prepare report.

Dillingen/Danube
05/09/1962

By order of
[signed:] Rieder

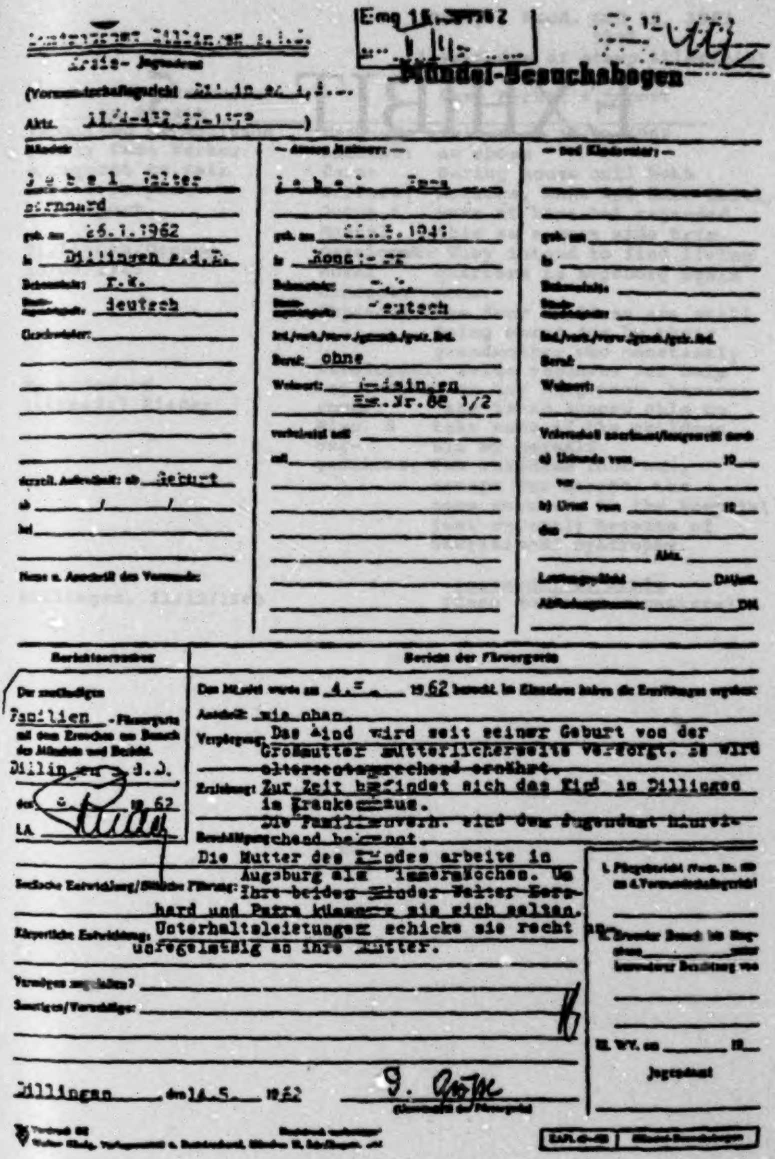
Case Worker's Report

Ward was visited on 05/04/1962.
Address: as above
Care:
Nurture:
Occup.:
Mental developmt:
Moral conduct:
Physical developmt.:
Any estate rcvd?:
Misc. & suggestions:

Infant has been cared for by his maternal grandmother since birth and is being fed commensurate with his age. Currently, the infant is hospitalised in Dillingen. Youth Office is well aware of domestic circumstances. Child's mother allegedly works in Augsburg as a chambermaid. She seldom tends her two children, Walter Bernhard and Petra. She sends support money to her mother very irregularly.

Dillingen, 05/14/1962

[signed:] I. Große
(Case Worker's signature)



Landratsamt Dillingen a.d.D.
Kreis- Jugendamt

Eing. 15. [illegible] 1962

Mündel-Besuchsbogen

(Vormundschaftsgericht Dillingen a.d.D. [illegible]
Aktz. [illegible]-1379)

Mündel:
G e b e l Walter
Bernhard
geb. am 26.1.1962
in Dillingen a.d.D.
Bekenntnis: r.k.
Staatsangehörigkeit: deutsch
Geschwister:
derzeit. Aufenthalt: ab Geburt
ab / /
bei
Name u. Anschrift des Vormundes:

— dessen Mutter: —
G e b e l [illegible]
geb. am [illegible].1941
in [illegible]
Bekenntnis: [illegible]
Staatsangehörigkeit: deutsch
led./verh./verw./getrennt/gesch. Ehe
Beruf: ohne
Wohnort: [illegible] Hs.Nr. 88 1/2
verheiratet seit
mit

— des Kindesvaters: —
geb. am
in
Bekenntnis:
Staatsangehörigkeit:
led./verh./verw./getrennt/gesch. Ehe
Beruf:
Wohnort:
Vaterschaft anerkannt/festgestellt durch
a) Urkunde vom 19
vor
b) Urteil vom 19
des
Aktz.
Leistungspflicht DM/mtl.
Abfindungssumme: DM

Berichtsersuchen

Der zuständigen Familien-Fürsorgerin mit dem Ersuchen um Besuch des Mündels und Bericht.
Dillingen a.d.D.
den [illegible] 1962
I.A.

Bericht der Fürsorgerin

Das Mündel wurde am 4.5. 1962 besucht. Im Einzelnen haben die Ermittlungen ergeben:
Anschrift: wie oben
Verpflegung: Das Kind wird seit seiner Geburt von der Großmutter mütterlicherseits versorgt. Es wird altersentsprechend ernährt.
Erziehung: Zur Zeit befindet sich das Kind in Dillingen im Krankenhaus.
Die Familienverh. sind dem Jugendamt hinreichend bekannt.
Beschäftigung:
Die Mutter des Kindes arbeite in Augsburg als [illegible]. Um
Seelische Entwicklung/Sittliche Führung: ihre beiden Kinder Walter Bernhard und Petra kümmere sie sich selten.
Körperliche Entwicklung: Unterhaltsleistungen schicke sie recht unregelmäßig an ihre Mutter.
Vermögen zugefallen?
Bemerkungen/Vorschläge:

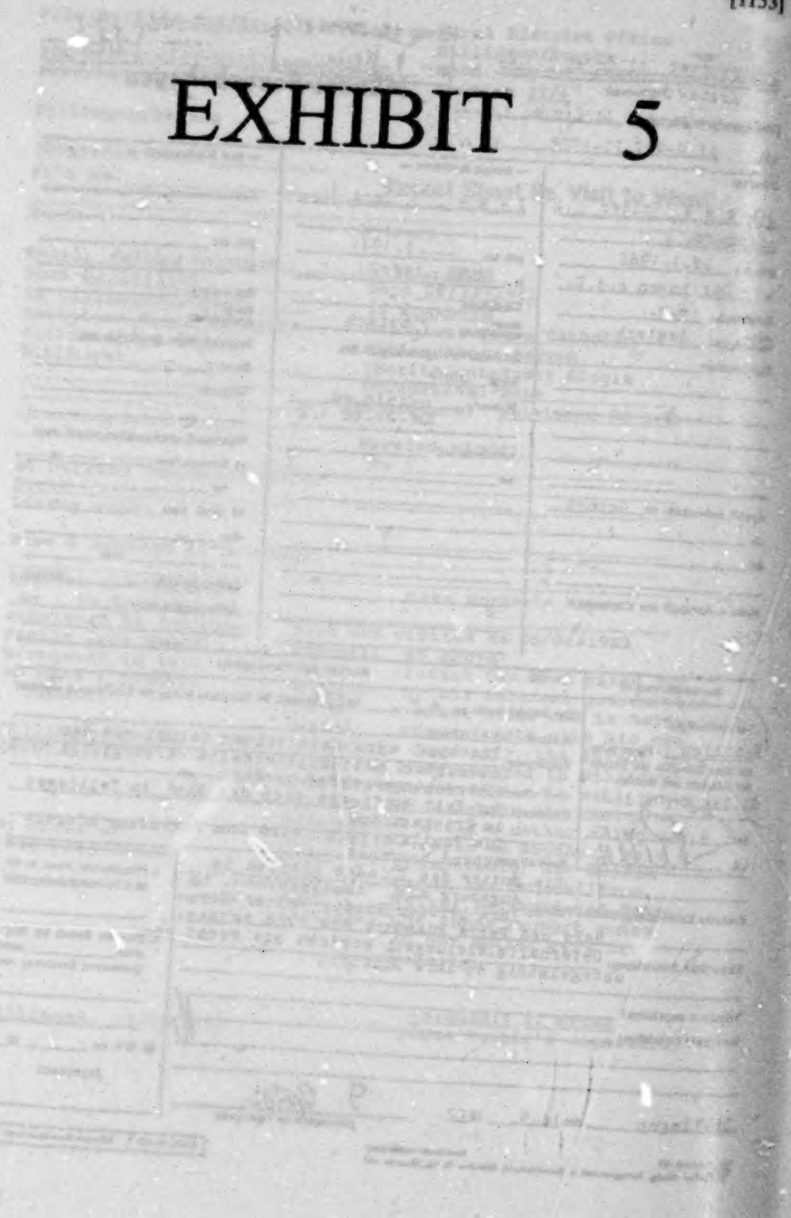
Dillingen, den 14.5. 1962

(Unterschrift der Fürsorgerin)

I. Pflegebericht (Vordr. Nr. [illegible]) an d. Vormundschaftsgericht
II. Erneuter Besuch [illegible]
besonderer Beziehung von
III. WV. am 19
Jugendamt

[illegible] | Mündel-Besuchsbogen

EXHIBIT 5



[Stamp:] Recd. OCT 12, 1963
5241
[remainder of stamp illegible]

Request f.Permission to Report

submitted by assigned Family Case Worker w/request to call ward & prepare report.

Dillingen/Danube
10/08/1963

By order of
[signed:] Rieder

Case Worker's Report

Ward was visited on 12/11/1963.
Address: as above
Care: During house call both
Nurture: mothers, Anna and Emma Gebel,
Occup.: were at home but regarded
Mental this as a mere side trip.
developmt: They intend to find living
Moral quarters in Augsburg again
conduct: soon.
Physical The four children are still
being cared for by their
grandmother who constantly
developmt.: sends requests for help
Any estate to her daughters, because
recd?: she is no longer able to
Misc. & take care of the children
sug- all by herself.
gestions: The children look wan,
except for Renate, who
once more was in the hospital
just recently because of
nutritional dystrophy.

Dillingen, 12/12/1963

[signed:] I. Große
(Case Worker's signature)

EXHIBIT 6

IV/411 - 70 - Copy -

Reference: The Gebel children, currently residing at
the Josefinum in Augsburg.

Memorandum:

On 01/18/1963, at 12:10 o'clock, the Chief Physician of the Josefinum Children's Hospital in Augsburg requested an extension of above-mentioned children's in-patient status. Said individual was requested to submit to us a written request for extension.

During the course of the discussion, the physician stated that the children could be released in approximately 10-14 days. In his opinion, their domestic environment is most unfavorable, lacking not only in supervision and nurture but primarily in care; Most likely, they do not get enough to eat; accommodations are extremely poor; the children are undernourished and appear haggard and sickly, and neither their grandmother nor their mother is in a position to care properly for the children. The former cannot be expected to nurture and care for more than 2 children, maximum. To leave more children in her care would be insupportable and irresponsible; that, if the 4 children presently under the medical care of Josefinum Hospital in Augsburg were to be returned to their former environment, they would have to remain at Josefinium for at least 6 or more weeks for recuperation. The physician would take it upon himself to approach the District Youth Welfare Office about sending the children into the Allgäu region [Bavaria] for several weeks (about 10-14 days) to recuperate, following their release from the hospital. Furthermore, he would recommend that, aside from the cost for the delivery and pickup of the children, there would be no further expenditures.

Unable to reach the case worker of the District Youth Welfare Office by telephone at the time (12.10 o'clock), the Chief Physician requested that the undersigned inform said office of aforementioned telephone conversation.

Dillingen/Danube, 01/18/1963
Rural District Office -
Department of Public Welfare
By Order:
[typed:] signed: Tiefenbacher

Copy

to Section II/4

on the premises
for your information

Rural District Office
- Department of Public Welfare -
[typed:] signed: Tiefenbacher

IV/411 – 70 - Abdruck -

Betreff: Kinder Gebel, z.Zt. Josefinum Augsburg.

Aktenvormerkung:

Der leitende Arzt des Kinderkrankenhauses Josefinum in Augsburg ersuchte am 18.1.1963, 12.10 Uhr, den Krankenhausaufenthalt der genannten Kinder noch zu verlängern. Der Genannte wurde ersucht, hier einen schriftlichen Verlängerungsantrag einzubringen.

Im weiteren Verlauf der Unterredung erklärte der Arzt, daß die Kinder in etwa 10 - 14 Tagen entlassen werden könnten. Nach seiner Meinung ist das Milieu zuhause denkbar ungünstig, es fehle dort nicht nur an der Erziehung und Versorgung der Kinder, sondern in erster Linie an der Betreuung der Genannten. Vermutlich erhalten diese dort nicht genügend zu essen, die Unterbringung sei denkbar schlecht; die Kinder seien unterernährt, machen einen abgehärmten, krankhaften Eindruck. Weder die Großmutter, noch die Kindesmutter seien in der Lage, die Kinder ordentlich zu versorgen. Der Ersteren könnte zugemutet werden, allerhöchstens die Erziehung und Betreuung von 2 Kindern zu übernehmen. Weitere Kinder dort zu belassen, sei nicht mehr zu vertreten und unverantwortlich. Sofern die 4 Kinder, die sich augenblicklich in ärztlicher Behandlung im Josefinum in Augsburg befinden, wieder in ihre frühere Umgebung zurückkehren sollten, müßten sie mindestens 6 oder noch mehr Wochen zur Erholung im Josefinum bleiben. Der Arzt wird von sich aus an das Kreisjugendamt herantreten, da die Kinder nach der Krankenhausbehandlung (etwa 10 - 14 Tage) für einige Wochen zur Erholung ins Allgäu kommen sollten. Er würde sich dafür

./.

verwenden, daß außer den Verbringungs- und Abholungskosten weitere Auslagen nicht entstehen.

Nachdem der leitende Arzt des genannten Heimes den Sachbearbeiter beim Kreisjugendamt nicht mehr telefonisch sprechen konnte (12.10 Uhr), ersuchte er den Unterfertigten, diese Stelle über die geführte Unterredung zu unterrichten.

Dillingen a.d.Donau, den 18.1.1963
Landratsamt - Sozialhilfeverwaltung
I.A.
gez.: Tiefenbacher

In Abdruck

an
das Sachgebiet II/4

im Hause

mit der Bitte um Kenntnisnahme.

Landratsamt Dillingen a.d.Donau
- Sozialhilfeverwaltung -
gez.: Tiefenbacher

EXHIBIT 7

Copy

Hindelang/Allgäu, 04/03/63
Gailenbergstr.170
Phone: 222

To: Chief Physician of
Josefinum [Hospital]

Augsburg

Dear Dr. Freislederer,

Your 4 small Gebel-charges spent the period from 02/21 until 03/20/63 here with us.

Following is a report of medical findings both at the time of admission and the time of release, prepared by our physician Dr. Heincke:

Petra Gebel, born 07/21/60

02/21/63: Height proportionate to age; nutritional condition is adequate; blood circulation in mucous membrane is adequate; maxillary glands are small and robust; expiration slightly prolonged and rough, without secondary murmur; tonsils much enlarged and red--no coating; heart normal; weight, 11.2 kg.

03/06/63: Flu, temperature: 38.5 C; lungs: rougher expiration without secondary murmur; tonsils much enlarged and red; prescribed durenat-juice; fever subsided.

03/09/63: Lungs normal; throat only slightly red; child may be up and about.

03/19/63: Child much improved; skin still pale; good blood circulation in mucous membrane; tonsils enlarged, without redness; heart and lungs normal; weight, 12.6 kg.

Walter Gebel, born 01/26/62

02/21/63: Height proportionate to age; nutritional condition is good; good blood circulation in skin and mucous membrane; severe nose-cold; tonsils are small and not irritated; maxillary glands are small and robust; isolated large blisters above lungs; lungs normal; weight, 9.2 kg.

03/06/63: Child still suffering from nose-cold; throat without irritation; lungs normal.

03/11/63: Lungs normal.

03/19/63: Child well improved; healthy complexion; no throat-irritation; lungs and heart normal; weight, 10.3kg.

Renate Gebel, born 01/19/60

02/21/63: Height proportionate to age; nutritional condition adequate; pale skin; blood circulation in mucous membrane is moderate; tonsils not irritated;

maxillary glands are small and robust; heart and lungs are normal; weight, 11.3 kg.

03/04/63: Came down with flu; temperature, 39.2 C; rough expiration and isolated large blisters above both lungs; prescribed achromycine; also cardiazol to enhance circulation.

03/06 & 03/10: Our physician reexamined the child; fever subsided.

03/11/63: Renate able to be up and about.

03/19/63: Healthy complexion; good blood circulation in skin and mucous membrane; no redness in throat; heart and lungs normal; weight, 12.3 kg.

Michael Gebel, born 07/18/61

02/23/63; Child arrived with severe nose-cold; height proportionate to age; nutritional condition is moderate; good blood circulation in skin and mucous membrane; no redness in throat; maxillary glands are small and robust; thorax slightly rachitic; heart and lungs normal; weight, 11.1 kg

03/03/63: Throat and lungs normal.

03/19/63: Very healthy appearance; good blood-circulation in skin and mucous membrane; throat without redness; heart and lungs normal; weight, 12.6 kg.

All four children developed an amazing appetite and became acclimatized to their new environment very quickly. Because of the wonderful winter weather, they were able to be outdoors almost every day and looked very well-rested, when the case worker from Dillingen picked them up. However, there was a heart-wrenching scene, when the four children were put into the car and none of them wanted to leave. They let out ear-splitting screams and tried to get out of the car by pushing against the windows. To console them, I placed a large teddy bear into the car, which took their minds off their departure a bit.
The clothes and underwear, which the children had brought along, we returned to the Josefinum, and we asked the case worker to return their boots from Weisingen as well, since I had been unable to come up with 4 pair of new boots, much as I tried. However, we did succeed in outfitting them with complete sets of new clothes before sending them home. Kind donors had sent slacks, stockings, tights, sweaters, and coats, so as to make the four of them look very cute, dressed in matching brother-and-sister outfits on the day of their departure.

[Next paragraph is unrelated to the Gebel family.] Little Sylvia Oppel, who could not come along at the time, can be admitted after Easter.

If you ever get children as wretched as these again--we now have enough room to take them in.

Cordially,

Sister Martha Utsch

An den
Herrn Chefarzt des
Josefinums

Augsburg

Sehr geehrter Herr Dr.Freisleder,

Ihre 4 kleinen Schützlinge Gebel sind in der Zeit vom 21.2. - 20.3.63 bei uns gewesen.

Zunächst die Aufnahme- und Entlassungsbefunde durch unsere Ärztin Frau Dr.Neinke:

Petra Gebel, geb. 21.7.60

21.2.63: Größe dem Alter entsprechend, ausreichender Ernährungszustand, Schleimhäute ausreichend durchblutet, kleine derbe Kieferwinkeldrüsen, etwas verlängertes und verschärftes Expirium, keine Nebengeräusche, Tonsillen sehr groß, gerötet, keine Beläge, Herz o.B. Gewicht: 11,2 kg.

6.3.63: Grippe, Temperatur, 38,3, Lunge verschärftes Expirium, keine Nebengeräusche, sehr große gerötete Tonsillen. Es wurde Durenatsaft verordnet. Temperaturen klangen ab.

8.3.63: Lungen o.B. Rachen nur noch leicht gerötet, Kind kann wieder aufstehen.

19.3.63: Sehr gut erholtes Kind, Haut noch blaß, Schleimhäute gut durchblutet, Tonsillen groß, nicht gerötet, Herz und Lungen o.B. Gewicht 12,6 kg.

Walter Gebel: geb. 26.1.62

21.2.63: Größe dem Alter entsprechend, guter Ernährungszustand, Haut und Schleimhäute gut durchblutet, starker Schnupfen, Tonsillen klein, reizlos, kleine derbe Kieferwinkeldrüsen, über beiden Lungen einzelne grobblasige RG, Lungen o.B. Gewicht 9, 2 kg.

6.3.63: Kind hat immer noch Schnupfen, Rachen reizlos, Lungen o.B.

11.3.63: Lungen o.B.

19.3.63: Kind hat sich gut erholt, frisches Aussehen, Rachen reizlos, Lungen und Herz o.B. Gewicht 10,3 kg.

Renate Gebel: geb. 19.1.60

21.2.63: Große dem Alter entsprechend, ausreichender Ernährungszustand, Haut blaß, Schleimhäute mäßig durchblutet, Tonsillen reizlos, kleine derbe Kieferwinkeldrüsen, Herz und Lungen o.B. Gewicht 11,3 kg.

4.3.63 An Grippe erkrankt, Temperatur 39,2 über beiden Lungen verschärftes Expirium mit einzelnen grob-

blasigen RG, es wurde Achromycin verordnet, zur Unterstützung des Kreislaufs Cardiazol.
5. u. 10.3. Unsere Ärztin sah das Kind nochmal an, die Temperatur sank ab.
11.3.63 Renate konnte wieder aufstehen
19.3.63 Frisches Aussehen, Haut und Schleimhäute gut durchblutet, Rachen nicht gerötet, Herz und Lungen o.B. Gewicht 12,3 kg.

Michael Gebel: geb. 18.7.61

23.2.63 Kind ist mit starkem Schnupfen angekommen, Größe dem Alter entsprechend, mäßiger Ernährungszustand Haut und Schleimhäute gut durchblutet, Rachen nicht gerötet, kleine derbe Kieferwinkeldrüsen, leicht rachitischer Thorax, Herz und Lungen o.B. Gewicht 11,1 kg.
1.3.63 etwas verschärftes Expirium, Rachen leicht gerötet.
3.3.63 Rachen o.B. Lungen o.B.
19.3.63 Sehr frisches Aussehen, Haut und Schleimhäute gut durchblutet, Rachen nicht gerötet, Herz und Lungen o.B. Gewicht 12,5 kg.

Alle vier Kinder entwickelten einen beneidenswerten Appetit und lebten sich sehr schnell in ihrer neuen Umgebung ein. Durch das schöne Winterwetter konnten sie fast täglich im Freien sein, waren auch alle sehr frisch erholt, als sie von der Fürsorgerin aus Dillingen wieder abgeholt wurden. Es war allerdings erschütternd, als die 4 Kinder ins Auto verfrachtet wurden und keines mit diesem Abtransport einverstanden war. Es gab ein ohrenbetäubendes Geschrei und alle versuchten, sich an die Scheiben stemmend, wieder aus dem Auto herauszukommen. Als Trost setzte ich ihnen dann noch einen großen Teddybären ins Auto, der sie vom Abschied etwas ablenkte.
Die Kleidungs- und Wäschestücke, die die Kinder mitgebracht hatten, haben wir an das Josefinum zurückgeschickt und die Fürsorgerin gebeten, von Weisingen aus auch die Stiefel zurückzuschicken. Denn 4 Paar neue Stiefel konnte ich mit dem besten Willen nicht mehr organisieren, obwohl es uns gelungen war, die Kinder völlig neu eingekleidet nach Haus zu entlassen. Gütige Spender hatten mir lange Hosen, Strümpfe, Strumpfhosen, Pullover und Jacken geschickt, sodaß die vier sogar in passender Geschwisterkleidung bei der Abreise wirklich ganz reizend aussahen.

Die kleine Sylvia Oppel, die ja damals noch nicht mitgekommen konnte, kann nach Ostern aufgenommen werden. Ich werde die Mutter benachrichtigen.

Wenn sie mal wieder so elende Kinder haben, haben wir jetzt auch wieder Platz, sie aufzunehmen.

Freundliche Grüße

Schw. Martha Utsch

EXHIBIT 8

[illegible]

During my visit at the hospital in Dillingen, I learned from my mother and married sister, Mrs. Katharina Matt, that none of this is true."

Dillingen/Danube, 01/03/1964 [sic]
(signed on shorthand pad)

Closed by: **v.g.u.u. [=read to, approved & signed]**
s/Rieder **[typed:] s/ Emma Gabel**

Betreff: Amtsvormundschaft über die Kinder

Gebel Petra, geb. 21.7.60 KM Emma Gebel
Gebel Walter, geb. 26.1.62
Gebel Renate, geb. 19.5.60 KM Anna Gebel
Gebel Michael, geb. 12.7.61

Niederschrift:

Die Mutter der beiden erstgenannten Kinder Frl. Emma Gebel wurde heute durch ihren Quartiergeber, Herrn Xaver Stehle, Augsburg, Schönbachstr.98 zum Telefon gerufen. Ihr wurde mitgeteilt, daß ihre beiden Kinder am Freitag den 31.1.64 in das Kinderheim nach Wittislingen verbracht werden mußten. Ebenso die Kinder ihrer Schwester Anna. Die Unterbringung war deshalb veranlasst, weil die Großmutter der Kinder, Frau Maria Gebel, Weisingen, Hs.Nr.88 1/2 plötzlich in das Krankenhaus Dillingen eingeliefert werden mußte. Die Kinder waren sich selber überlassen. Frl. Emma Gebel erhielt die Weisung, umgehend nach Dillingen zur Klärung des Sachverhaltes zu kommen Sie sprach gegen 14.00 Uhr beim Kreisjugendamt Dillingen vor! Nach Bekanntgabe des Sachverhalts gab sie an, daß sie heute im Cafe Biedermeier, Augsburg, Brucknerstr.2 Telefon 318 404 hätte als Bedienung anfangen sollen. Eine telefonische Rücksprache in Augsburg mit dem Geschäftsleiter des Cafes erbrachte, daß Gebel Emma zwar noch nicht als Bedienung eingestellt ist, sondern sich lediglich vorstellen sollte. Dies sei im Laufe des heutigen Tages auch noch möglich. Der Geschäftsleiter teilte mit, daß er jeweils nach 15.00 Uhr anzutreffen wäre. Herr Dr. Kaspik teilte auf Anfrage mit, daß Frau Gebel mindestens noch diese Woche, wenn nicht sogar noch nächste Woche im Krankenhaus sein müsse. Der genaue Zeitpunkt der Entlassung stünde noch nicht fest.

Frl. Emma Gebel will nun die Kinder im Kinderheim in Wittislingen belassen und der Sozialhilfeverwaltung eine entsprechende Kostenhaftungserklärung geben. Sie will unter allen Umständen die Arbeit als Bedienung im Cafe Biedermeier aufnehmen und wie sie angibt, für den Unterhalt ihrer Kinder selbst aufkommen.

Ihre Schwester Anna Gebel habe sie in Augsburg ebenfalls in einem Cafe-Haus angetroffen. Sie sei dort mit noch 2 anderen Mädchen dort gewesen. An dem gleichen Tisch waren auch noch einige Männer, die mir nicht bekannt waren. Auf die Frage, ob sie nicht mit nach Dillingen fahren wolle verneinte sie dies. Sie wolle angeblich heute gegen 16.00 Uhr mit dem Bundesbahnbus nach Weisingen zurückfahren.

Am Freitag den 31.1.64 kam sie in meine Wohnung, Schönbachstr.98 und erzählte mir, daß der Bruder Oswald Gebel betrunken nach Hause gekommen sei und die Mutter geschlagen habe. Die Mutter sei zu ihrer verheirateten Tochter Frau Katharina Matt nach Holzheim gegangen. Die Familie Matt hate nun meinen Bruder zur Rede gestellt. Dieser sei am Samstag morgens den 1.2.64 zu Hause weggelaufen. Wo er sich aufhält sei nicht bekannt.

Bei meinem Besuch im Krankenhaus in Dillingen erfuhr ich dann durch meine Mutter und meine verheiratete Schwester Frau Katharina Matt, daß dies alles nicht zutreffend sei.

Dillingen a.d. Donau, den 3.1.1964
(Unterschrift im Stenogramm)

geschlossen:

gez. Rieder

v.g.u.u.

gez. Emma Gebel

VII 126/62

1. **Release of files approved.**
2. **Mailing of files to be entered into record.**
3. **Ship files by certified mail to:**

Dr. Müller, et al
Attorneys at Law
Faktoreistr. 1

66111 Saarbrücken

commensurate with request, dated 01/05/1994, for a one-week review.

Please remit flat-rate postage of DM 10.00 either by coupons or fee-stamp, in compliance with § 5 1II of Judicial Administrative Code.

89407 Dillingen, January 12, 1994
Director of County Court

[signed:] Helmschrott
Helmschrott

Note:

The guardianship files pertaining to Gebel (La Grand), Karl Heinz, born 10/10/1963 (VII 393/63 AG.Dillingen) were delivered to the County Court in 35510 Butzbach and entered into its files on 07/21/166 under file reference # VII 111/66.

C 60 33/

Dillingen, January 12, 1994
County Court Administrative Office:

[signed:] Schweizer
Legal Clerk

VII 126/62

1. Die Hinausgabe der Akten wird genehmigt.

√ 2. Aktenversendung vormerken.

3. Mit Akten – per Einschreiben –

an die
Herren Rechtsanwälte
Dr. Müller u.a.
Faktoreistr. 1

66111 Saarbrücken

gem. Ersuchen vom 5.1.1994 zur Einsicht auf die Dauer von 1 Woche.

Den Versendungspauschbetrag von DM 1o,-- nach § 5 III JVerwK bitte ich in Kostenmarken bzw. Anbringung des Gebührenstempels zu entrichten.

894o7 Dillingen, den 12. Januar 1994
Der. Direktor des Amtsgerichts:

Helmschrott

Hinweis:

Die Vormundschaftsakten betr. Gebel (La Grand) Karl-Heinz, geb. 1o.1o.1963 (VII 393/63 AG.Dillingen) wurden an das Amtsgericht 3551o Butzbach abgegeben und von dort am 21.7.1966 unter dem Aktenzeichen VII 111/66 übernommen.

c 6c 33/

Dillingen, den 12. Januar 1994
Gesch.Stelle d. Amtsgerichts:

Schweizer
JHSekr.

EXHIBIT 10

II/4-432/27 - 1405,1426,1549,1578

Reference: Public Guardianship of
Gebel, Renate, born 05/19/1960* Anna
Gebel, Petra, " 07/21/1960* Emma
Gebel, Michael " 07/18/1961* Anna
Gebel Walter, " 01/26/1962* Emma

Protocol

This day, Mrs. Maria Gebel, residing in Weisingen, H.#88 1/2, grandmother of above-mentioned children, appeared at the District Youth Welfare Office. Having been informed about the contents of a letter dated 01/27/1964, from the Family-Compensation-Fund of the Northwest German Building Trade, Berlin, she made the following statement relating thereto:

The above-mentioned children have been under my care in Weisingen since their birth. Until and including the month of December, 1963, I received my children's allowance from the Family-Compensation Fund of the Northwest German Building Trade.

Following their hospitalization--only during the periods from 12/19 to 12/20/1962 in the Dillingen hospital and from 12/20 to 02/21/1963 at the Josefinum Children's Hospital in Augsburg, Kapellenstr.#30, as in-patients, said children spent until 03/20/63 in the Tama Recreation Home at Hindelang and were subsequently returned into the care of their grandmother.

Karlheinz Gebel, born 10/10/1963, is an illegitimate child of my daughter, Emma Gebel, born 08/22/1941, who is currently residing in the home of Xaver Stehle, #98 Schönbachstr in Augsburg. I do not know where she is employed. To my knowledge, she has placed the child in a [children's] home in Augsburg. In all likelihood, the Municipal Youth Welfare Department is the child's Guardian.

*phone: 31 8501

Dillingen/Danube, 01/30/1964
[typed:] s/: Marie Gebel

II/4 - 432/27 - 1405,1426,1549,1578

Betreff: Amtsvormundschaft über
Gebel Renate, geb.19. 5.1960 } Anna
Gebel Petra, " 21. 7.1960
Gebel Michael, " 18. 7.1961 } Emma
Gebel Walter, " 26. 1.1962

Niederschrift

Die Großmutter der o.a.Kinder, Frau Maria Gebel, wohnhaft in Weisingen Hs.Nr.88 1/2 erschien heute beim Kreisjugendamt. Ihr wurde der Inhalt des Schreibens der Familienausgleichskasse des nordwestdeutschen Baugewerbes, Berlin, vom 27.1.1964 bekanntgegeben. Sie gibt hierzu folgendes an:

Die o.a.Kinder befinden sich seit ihrer Geburt bei mir in Weisingen in Pflege. Bis einschließlich Dezember 1963 habe ich von der Familienausgleichskasse des nordwestdeutschen Baugewerbes das Kindergeld erhalten.

Die genannten Kinder waren lediglich in der Zeit vom 19.12. - 20.12.1962 im Krankenhaus in Dillingen und vom 20.12. - 21. 2.1963 im Kinderkrankenhaus Josefinum in Augsburg, Kapellenstr.30 in stationärer Behandlung. Sie waren ~~zu~~ anschließend bis [illegible] zum Erholungsaufenthalt im Erholungsheim Tama in Hindelang. Darnach kamen die Kinder wieder zur Großmutter in Pflege.

Bei dem Kind Karlheinz Gebel, geb.10.10.1963, handelt es sich um ein unehel.Kind meiner Tochter Emma Gebel, geb.22.8.1941, z.Zt. wohnhaft in Augsburg, [illegible] ~~[illegible] 25~~ bei Xaver Stehle^x. Wo sie beschäftigt ist, ist mir nicht bekannt. Soweit mir bekannt, hat sie das Kind in einem Heim in Augsburg untergebracht. Die Vormundschaft für dieses Kind dürfte vermutlich beim Stadtjugendamt in Augsburg geführt werden.

x) Tel. 118501

Dillingen a.d.D., den 30.1.1964

gez.: Marie Gebel

EXHIBIT 11

[Translation from German-Language Original]

Rural District Office
Dillingen on the Danube

888 Dillingen/Danube, 02/05/1964
Phone: 455,456,457.

II/4-432/27-1405,1426,
1549,1578 R/B
(please indicate in your reply)

To: Inspector, Rural Police
888 Dillingen/Danube

Reference: Public Guardianship of Children:
Gebel, Petra, born 07/21/1960 children's
Gebel, Walter, born 01/26/1962 mother:
Emma Gebel
Gebel, Renate, born 05/19/1960 children's
Gebel, Michael, born 07/18/1961 mother:
Anna Gebel

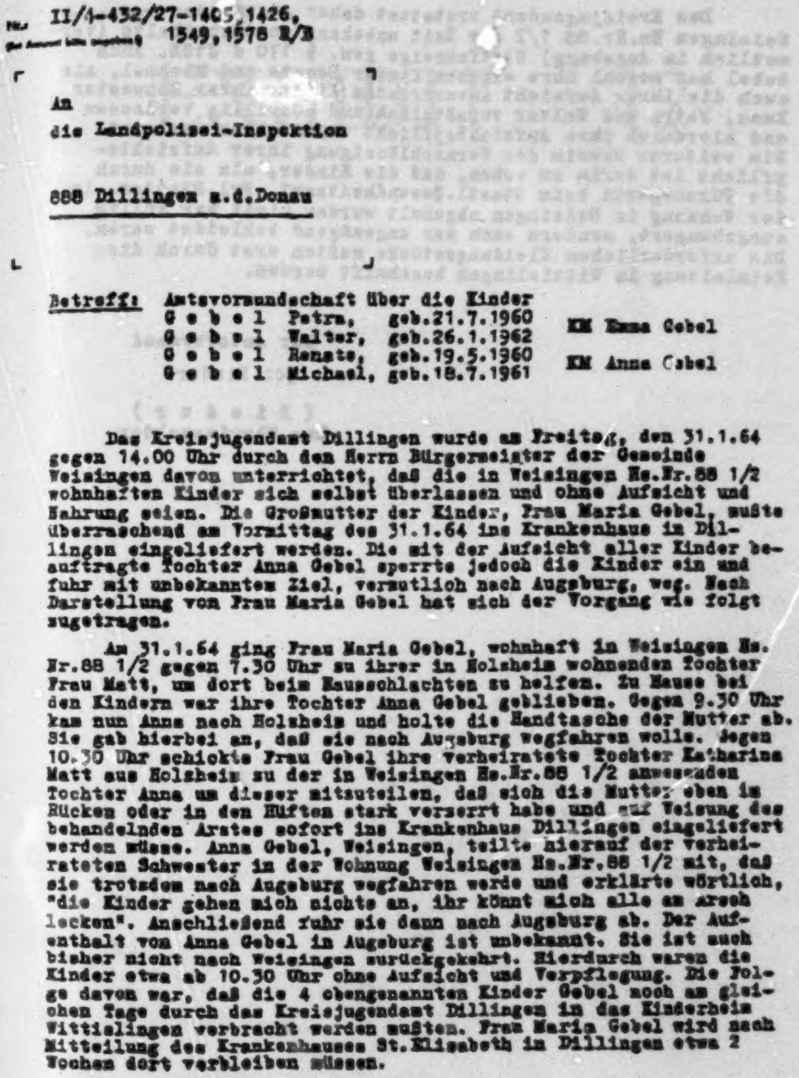
On 01/31/64, at approximately 2 p.m., the District Youth Welfare Office was informed by the mayor of the community of Weisingen, that the children residing in Weisingen, House #88 1/2, were on their own without supervision or food. On 01/31/64, the children's grandmother, Mrs. Maria Gebel, had to be admitted unexpectedly into the hospital at Dillingen. However, Anna Gebel, who had been entrusted with the supervision of the children, locked them up and left, destination unknown, presumably for Augsburg. Mrs. Maria Gebel described what transpired, as follows.

On 01/31/64, Mrs. Maria Gebel, residing at Weisingen, House #88 1/2, went to her daughter's, Mrs. Matt's house in Holzheim, to help her with domestic slaughtering, while Anna Gebel stayed at home with the children. At approximately 9:30 Anna arrived at Holzheim to pick up her mother's purse and mentioned that she intended to go to Augsburg. At approximately 10:30 Mrs. Gebel sent her married daughter, Katharina Matt, from Holzheim to her daughter Anna in Weisingen, House #88 1/2, to inform her that their mother had just severely sprained her back or hips and on instruction of her attending physician was to be admitted to the hospital in Dillingen immediately. Anna Gebel, Weisingen, replied to her married sister in House #88 1/2, Weisingen, that she was going to Augsburg anyway and used these words, "The children are none of my concern. You may kiss my ass, all of you," and left for Augsburg. Her whereabouts in Augsburg are unknown, nor has she returned to Weisingen to this date. This left the children without supervision or food, beginning at 10:30. As a result, the 4 above-mentioned Gebel children had to be taken to the Children's Home in Wittislingen that very day, which was arranged by the District Youth Welfare Department. According to information received from St. Elisabeth Hospital in Dillingen, Mrs. Maria Gebel will have to remain hospitalised for approximately 2 weeks. ./.

Therefore, the District Youth Welfare Office pressed criminal charges against Anna Gebel of Weisingen, H.#88 1/2, current whereabouts unknown (presumably in Augsburg), under the provisions of § 170 of the Penal Code. By intentionally and maliciously abandoning her own children, Renate and Michael, as well as those of her sister, Emma, Petra, and Walter, entrusted to her supervision, she deliberately failed in her supervisory responsibility. The fact that the children where not only completely famished but also clothed inadequately at the time they were picked up at their residence by Miss Stetter, social worker with the Public Health Department, is further proof of her having neglected her supervisory duties. The necessary clothing [for the children] had to be provided by the director of the children's home.

Public Guardian
s/ Rieder

(Rieder)
Officiating Chief Inspector



Nr.: II/4-432/27-1405,1426,
(bei Antwort bitte angeben) 1549,1578 R/B

An
die Landpolizei-Inspektion

888 Dillingen a.d.Donau

Betreff: Amtsvormundschaft über die Kinder
Gebel Petra, geb.21.7.1960 KM Emma Gebel
Gebel Walter, geb.26.1.1962
Gebel Renate, geb.19.5.1960 KM Anna Gebel
Gebel Michael, geb.18.7.1961

Das Kreisjugendamt Dillingen wurde am Freitag, den 31.1.64 gegen 14.00 Uhr durch den Herrn Bürgermeister der Gemeinde Weisingen davon unterrichtet, daß die in Weisingen Hs.Nr.88 1/2 wohnhaften Kinder sich selbst überlassen und ohne Aufsicht und Nahrung seien. Die Großmutter der Kinder, Frau Maria Gebel, mußte überraschend am Vormittag des 31.1.64 ins Krankenhaus in Dillingen eingeliefert werden. Die mit der Aufsicht aller Kinder beauftragte Tochter Anna Gebel sperrte jedoch die Kinder ein und fuhr mit unbekanntem Ziel, vermutlich nach Augsburg, weg. Nach Darstellung von Frau Maria Gebel hat sich der Vorgang wie folgt zugetragen.

Am 31.1.64 ging Frau Maria Gebel, wohnhaft in Weisingen Hs. Nr.88 1/2 gegen 7.30 Uhr zu ihrer in Holzheim wohnenden Tochter Frau Matt, um dort beim Hausschlachten zu helfen. Zu Hause bei den Kindern war ihre Tochter Anna Gebel geblieben. Gegen 9.30 Uhr kam nun Anna nach Holzheim und holte die Handtasche der Mutter ab. Sie gab hierbei an, daß sie nach Augsburg wegfahren wolle. Gegen 10.30 Uhr schickte Frau Gebel ihre verheiratete Tochter Katharina Matt aus Holzheim zu der in Weisingen Hs.Nr.88 1/2 anwesenden Tochter Anna um dieser mitzuteilen, daß sich die Mutter eben im Rücken oder in den Hüften stark verzerrt habe und auf Weisung des behandelnden Arztes sofort ins Krankenhaus Dillingen eingeliefert werden müsse. Anna Gebel, Weisingen, teilte hierauf der verheirateten Schwester in der Wohnung Weisingen Hs.Nr.88 1/2 mit, daß sie trotzdem nach Augsburg wegfahren werde und erklärte wörtlich, "die Kinder gehen mich nichts an, ihr könnt mich alle am Arsch lecken". Anschließend fuhr sie dann nach Augsburg ab. Der Aufenthalt von Anna Gebel in Augsburg ist unbekannt. Sie ist auch bisher nicht nach Weisingen zurückgekehrt. Hierdurch waren die Kinder etwa ab 10.30 Uhr ohne Aufsicht und Verpflegung. Die Folge davon war, daß die 4 obengenannten Kinder Gebel noch am gleichen Tage durch das Kreisjugendamt Dillingen in das Kinderheim Wittislingen verbracht werden mußten. Frau Maria Gebel wird nach Mitteilung des Krankenhauses St.Elisabeth in Dillingen etwa 2 Wochen dort verbleiben müssen.

Das Kreisjugendamt erstattet daher gegen Anna Gebel — Weisingen Hs.Nr.88 1/2 zur Zeit unbekannten Aufenthalts (vermutlich in Augsburg) Strafanzeige gem. § 170 d StGB. Anna Gebel hat sowohl ihre eigenen Kinder Renate und Michael, als auch die ihrer Aufsicht anvertrauten Kinder ihrer Schwester Emma, Petra und Walter vorsätzlich und böswillig verlassen und hierdurch ihre Aufsichtspflicht vorsätzlich verletzt. Ein weiterer Beweis der Vernachlässigung ihrer Aufsichtspflicht ist darin zu sehen, daß die Kinder, als sie durch die Fürsorgerin beim Staatl.Gesundheitsamt, Frl.Stetter, in der Wohnung in Weisingen abgeholt wurden nicht nur völlig ausgehungert, sondern auch nur ungenügend bekleidet waren. Die erforderlichen Kleidungsstücke mußten erst durch die Heimleitung in Wittislingen beschafft werden.

Der Amtsvormund

gez.Rieder

(Rieder)
Reg.Oberinspektor

EXHIBIT 12

XII 51/64 Dillingen/Danube, 02/17/1964

The County Court of Dillingen/Danube
Guardianship Court

--in the case of

Gebel Petra, Walter, Renate, and Michael, all from Weisingen, Rural District of Dillingen/Danube

issues the following

Order:

Gebel Petra, born 07/21/1960,
Gebel Walter, born 01/26/1962,
Gebel Renate, born 05/19/1960,
Gebel Michael, born 07/18/1961,
last residing in Weisingen, House #88, Roman Catholic, legally represented by the District Youth Welfare Office of Dillingen/Danube,

are to be delivered into the temporary custody of the Welfare Department.

Reasons:

Petra and Walter Gebel were born to their mother Emma Gebel and Renate and Michael Gebel to their mother Anna Gebel, out of wedlock. For three of the children no father could be ascertained. Neither of the two mothers is holding a steady job. Maria Gebel, mother of the children's mothers, who cared for the four children until recently, did so inadequately, which resulted in their hospitalization because of dystrophy. Subsequently, they were admitted into a home for children at the expense of public welfare. Currently, their grandmother is hospitalized and will no longer be physically able to care for the children. They were left in Weisingen without supervision, sufficient clothing or food. Anna Gebel, who should have looked after the children, did not take care of them, nor did her sister.

In view of both sisters' unsettled lifestyle, no future improvement of their children's lot can be expected.

The above facts were substantiated in a report submitted by the District Youth Welfare Office of Dillingen.

Under the circumstances as described, it is absolutely essential that the children be entrusted to the care of social welfare and committed to a children's home. Any other way of caring for them would be unsatisfactory. By the same token, being reared under the care of social welfare is not a hopeless prospect.
The above decision became necessary under the provisions of §§ 64 & 67 of the Youth Protection Act.

signed: Wagewnhuber
Director, County Court

02/24/64
[signatures illegible]

[Stamp:] Dillingen, Feb. 25, 1964
County Court of Dillingen/Danube
- Guardianship Court -
[signed:] Unger
Judicial Officer

Das Amtsgericht Dillingen/Donau
Vormundschaftsgericht

erlässt in Sachen

G e b e l Petra, Walter, Renate und Michael, sämtliche aus Weisingen, Landkreis Dillingen/Donau

wegen Fürsorgeerziehung

folgenden

B e s c h l u s s:

G e b e l Petra, geb. am 21. 7. 1960,
G e b e l Walter, geb. am 26.1.1962,
G e b e l Renate, geb. am 19.5.1960,
G e b e l Michael, geb. am 18.7.1961
zuletzt wohnhaft in Weisingen, Haus-Nummer 8d, römisch katholisch, gesetzlich vertreten durch das Kreisjugendamt Dillingen/Donau

werden der vorläufigen Fürsorgeerziehung überwiesen.

G r ü n d e :

Gebel Petra und Walter sind von ihrer Mutter Gebel Emma, Gebel Renate und Michael sind von ihrer Mutter Gebel Anna unehelich geboren. Bei drei Kindern konnte ein Erzeuger nicht festgestellt werden. Die Kindsmütter gehen keiner geregelten Arbeit nach. Die Personensorge für ihre Kinder übernahm [illegible] die Mutter der beiden Kindsmütter, [illegible] Gebel, in Weisingen. Die Großmutter vermochte jedoch schon bisher ihre vier Enkel nur unzulänglich zu betreuen, so daß die Kinder wegen Ernährungsstörungen in einem Krankenhaus und später in einem Kinderheim untergebracht werden mussten. Die Kosten hierfür traf die öffentliche Fürsorge. Nunmehr musste die Großmutter in ein Krankenhaus eingeliefert werden; sie ist künftig gesundheitlich nicht mehr in der Lage, ihre Enkel zu betreuen. Diese blieben ohne Aufsicht, ohne genügende Bekleidung und Nahrung in Weisingen zurück. Anna Gebel, welche sich [illegible] der hätte annehmen müssen, kümmerte sich nicht um sie, ebensowenig ihre Schwester. Bei dem ungeregelten Lebenswandel der beiden Schwestern ist auch künftig nicht zu erwarten, daß sich das Los ihrer Kinder bessern werde.

Dieser Sachverhalt ist durch einen Bericht des Kreisjugendamtes Dillingen glaubhaft gemacht.

Unter den gegebenen Verhältnissen ist Fürsorgeerziehung und Heimeinweisung der Kinder unerläßlich. Andere Erziehungsmittel reichen nicht aus. Andererseits ist Fürsorgeerziehung nicht aussichtslos.

Es war daher gem. §§ 64, 67 J G zu entscheiden, wie geschehen.

gez.: Bagenhuber
Amtsgerichtsdirektor

24. 2. 64

Dillingen, den 25. Feb. 1954
Amtsgericht Dillingen a/Donau
Vormundschaftsgericht
[illegible]

EXHIBIT 13

Rural District Office
Dillingen on the Danube
Phone: 455,456,457 **888** **Dillingen on the D.**
# II/4-432/27- **03/03/1964**
(to be referred to in any reply) R/Wg

To: County Court
- Guardianship Court -

888 Dillingen on the Danube

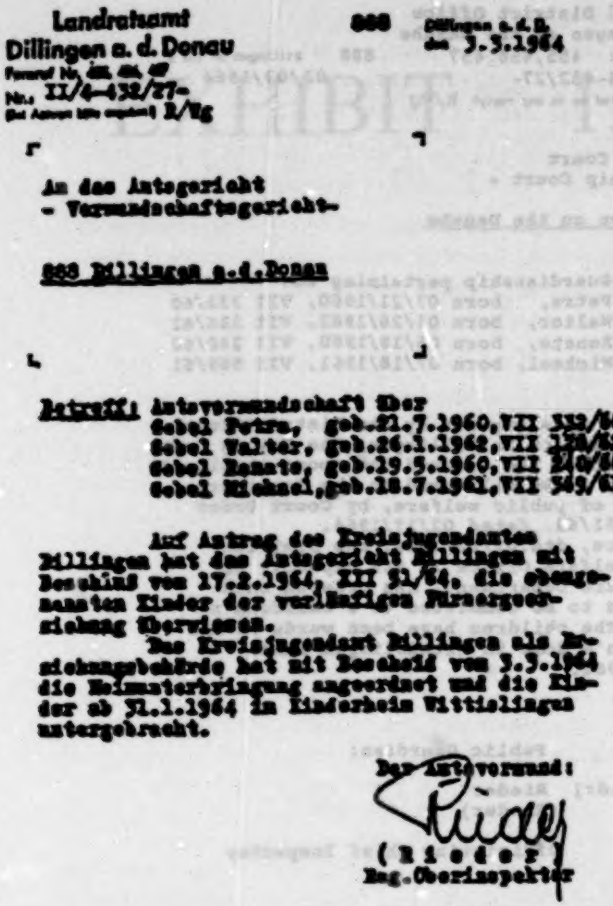
Re: Public Guardianship pertaining to:
Gebel, Petra, born 07/21/1960, VII 332/60
Gebel, Walter, born 01/26/1962, VII 126/62
Gebel, Renate, born 05/19/1960, VII 240/60
Gebel, Michael, born 07/18/1961, VII 569/61

Pursuant to a request by the District Youth Welfare Office in Dillingen, the County Court of Dillingen has ordered the above-mentioned children to be delivered to the temporary custody of public welfare, by Court Order Nr.XII 51/64, dated 02/17/1964.
By notice, dtd.03/03/1964, the District Youth Welfare Office in its capacity as Youth-Care Department, has ordered said children to be committed to a children's home. The children have been wards of the Children's Home in Wittislingen since 01/31/1964.

Public Guardian:

[signed:] Rieder
(Rieder)

Officiating Chief Inspector



Landratsamt
Dillingen a. d. Donau
Fernruf Nr. [illegible]
Nr.: II/4-432/27-
(Bei Antwort bitte angeben) R/Wg

888 Dillingen a. d. D.
den 3.3.1964

An das Amtsgericht
- Vormundschaftsgericht-

888 Dillingen a.d.Donau

Betreff: Amtsvormundschaft über
Gebel Petra, geb.21.7.1960,VII 332/60
Gebel Walter, geb.26.1.1962,VII 128/62
Gebel Renate, geb.19.5.1960,VII 240/60
Gebel Michael,geb.18.7.1961,VII 369/61

Auf Antrag des Kreisjugendamtes Dillingen hat das Amtsgericht Dillingen mit Beschluß vom 17.2.1964, XII 51/64, die obengenannten Kinder der vorläufigen Fürsorgeerziehung überwiesen.

Das Kreisjugendamt Dillingen als Erziehungsbehörde hat mit Bescheid vom 3.3.1964 die Heimunterbringung angeordnet und die Kinder ab 31.1.1964 im Kinderheim Wittislingen untergebracht.

Der Amtsvormund:
Rieder
(Rieder)
Reg.Oberinspektor

VII 1186/[illegible]
County Court of Dillingen/Danube
Dillingen/D., 04/28/1966
XI : 11/66

EXHIBIT 14

In the case of

G u h e l, Peter, born 07/2[illegible]
Renate, born 11/13/1960; Michael, born 07/19/1961.-

Subject: Public Welfare a. Protection of Children

the County Court/Guardianship Court of Dillingen/Danube,

issues the following

C o u r t O r d e r :

1) G u h e l, Peter, born 07/21/1959,
2) G u h e l, Helmut, born 01/06/1963,
3) G u h e l, Renate, born 11/13/1960,
4) G u h e l, Michael, born 07/19/1961,

1) and 3) born out of wedlock to Rosa Gubel; 2) and 4) born out of wedlock to Rosa Gubel, both residing in Augsburg, [illegible]

---all of the above children being legally represented by the District Youth Welfare Office in Dillingen/Danube---

are to be delivered permanently into the custody of Public Welfare.

[illegible]

R e a s o n s

The Court Order issued on 03/[illegible]/1966, said children were entrusted to the temporary custody of Public Welfare. The facts underlying said order were verified by both mothers, as well as the grandmother of the children. Therefore, no further evidence is needed. Reference is made to the contents of said court order.

Prior to issuance of present court order for permanent custody of the children by Public Welfare, both mothers, grandmother, the District Youth Welfare Office, and the municipal & church authorities were heard.

According to school and [illegible] opinion, the children are fit to live in a children's home.

signed: Hagenauer, County Court Director

[illegible seal] Attested by County Court Registry. Signed: [illegible]

VII 126/62
County Court of Dillingen/D.
XII 51/64 Dillingen/D., 06/25/1964

In the case of

Gebel, Petra,born 07/21/1960; Walter,born 01/26/1962;
Renate,born 05/19/1960; Michael,born 07/18/1961--

Subject: Public Welfare as Custodian of Children

the County Court/Guardianship Court of Dillingen/Danube,

issues the following

Court Order:

1) Gebel, Petra, born 07/21/1960,
2) Gebel, Walter, born 01/26/1962,
3) Gebel, Renate, born 01/19/1960
4) Gebel, Michael, born 07/18/1961,

1) and 2) born out of wedlock to Emma Gebel; 3) and 4) born out of wedlock to Anna Gebel, both residing in Augsburg, Schönbachstrasse 98/0,

--all of the above children being legally represented by the District Youth Welfare Office in Dillingen/Danube--

are to be delivered permanently into the custody of Public Welfare.

[Stamp:] Dillingen, July 2, 1964
County Court of Dillingen/Danube
- Guardianship Court -
[signed:] Unger
Judicial Officer

Reasons.

Per Court Order issued on 02/17/1964, said children were turned over to the temporary custody of Public Welfare. The facts underlying said order were verified by both mothers. as well as the grandmother of the children. Therefore, no further evidence is needed. Reference is made to the contents of said court order.

Prior to issuance of present court order for permanent custody of the children by Public Welfare, both mothers, grandmother, the District Youth Welfare Office, and Municipal & Church authorities were heard.

According to expert medical opinion, the children are fit to live in a children's home.

signed: Wagenhuber, County Court Director

[illegible seal] Attested by County Court Registry. signed: Baue

Amtsgericht Dillingen/D.
XII 51/64

Dillingen/D., den 25. 6. 1964.

In Sachen

Gebel Petra, geb. 21.7.1960, Walter, geb. 26.1.1962,
Renate, geb. 19.5.1960, Michael, geb. 18.7.1961,

wegen Fürsorgeerziehung

erlässt das Amtsgericht-Vormundschaftsgericht Dillingen/Donau folgenden

Beschluss:

1) **Gebel** Petra, geboren am 21.7.1960,
2) **Gebel** Walter, geboren am 26.111962,
3) **Gebel** Renate, geboren am 19.1.1960,
4) **Gebel** Michael, geboren am 18.7.1961

zu 1 und 2 uneheliche Kinder von Gebel Emma, zu 3 und 4: uneheliche Kinder von Gebel Anna, beide wohnhaft in Augsburg, Schönbachstrasse 98/0,

sämtliche Kinder gesetzlich vertreten durch das Kreisjugendamt Dillingen/Donau

werden der Fürsorgeerziehung endgültig überwiesen.

Hg.

1) K.g.
2) z. den Fürs. Bl. 4

Gründe.

Ausgef. den, -2. Juli 1964
Amtsgericht Dillingen/Donau
– Vormundschaftsgericht –
Rechtspfleger

Mit Beschluss vom 17.2.1964 wurde die vorläufige Fürsorgeerziehung der Kinder angeordnet. Die Tatsachen, auf welche diese Anordnung gestützt wurde, wurden von den Kindsmüttern und der Grossmutter der Kinder als richtig anerkannt. Es bedarf daher keiner weiteren Beweise. Auf den Inhalt des Beschlusses wird Bezug genommen.

Von der Anordnung der endgültigen Fürsorgeerziehung wurden die beiden Kindesmütter, die Grossmutter der Kinder das Kreisjugendamt, die Gemeinde und die kirchliche Behörde gehört

Nach ärztlichen ~~erzieherischen~~ Gutachten eignen sich die Kinder für Heimerziehung.

Da die Gründe für die Anordnung der Fürsorgeerziehung fortbestehen, war daher zu entscheiden wie geschehen.
Das Verfahren ist gebührenfrei (§§ 64,65,JWG., 76 JWG.)

gez. Jagenhuber
Amtsgerichtsdirektor

Zur Beglaubigung
Geschäftsstelle des Amtsgerichts.

EXHIBIT 15

to be unable to proceed any further in this matter."

Pursuant to Court Order X 51/64, dated 02/17/1964, issued by the County Court of Dillingen, the child Walter Gebel was delivered into the custody of Public Welfare. Permanent custidy by public welfare was ordered on 06/25/1964. The boy was admitted into the Wittislingen Children's Home, where he remained until 07/11/1966.

Expenses incurred for the care in the Children's Home had to be covered by the Social Assistance Department of the District of Swabia in Augsburg and effective 01/01/1966 by the Rural District Office/District Youth Welfare Office in Dillingen on the Danube. Beginning in January 1966, the monthly child support of DM 25.00, to which the child's mother was entitled for her son Walter, was channeled into the District Youth Welfare Office. The monthly sum of DM 150.00 in child support received by this office was turned over to the District Youth Welfare Office as reimbursement for expenses incurred by the Children's Home.

A court order issued by the County Court of Dillingen on 06/30.1966, rescinded the previous order for public-welfare care, since circumstances had changed. On 03/18.1966, the child's mother entered into matrimony with Masie Lee Lagrand, member of the US Armed Forces, before the Magistrate in Pohl-Göns. On 07/11/1966, Walter was returned to his mother.

There was no ward-estate in trust.

The Rural District Office-District Youth Welfare Office attests the correctness and completeness of the above information. Enclosed, we return the Certificate of Appointment, dated 03/27/1962.

Public Guardian

[signed:] Rieder
(Rieder)
Officiating Chief Inspector

Disposition

1) Copy of the Final Report to be send to the child's mother;

2) affix appointment coupon;

3) close out file and keep on record.

Dillingen/Danube, 10/21/1966
County Court

[signed:] Teigl
(Teigl)
Judicial Officer

Nr. II/a-432/27-1578 Hö/Wr.
(Bei Antwort bitte angeben)

Amtsgericht Dillingen
19.XI.1966

An
das Amtsgericht ·
- Vormundschaftsgericht -

888 Dillingen a.d.Donau

Betreff: Amtsvormundschaft über Walter Bernhard Gebel, geb.26.1.1962
Dort.Az.:VII 126/62

Beilage: - 1 -

Mit Beschluß des Amtsgerichts Dillingen vom 27.7.1966 wurde der Mutter, Frau Emma Lagrand geb.Gebel, wohnhaft in Pohl-Göns, 6309 Windhofstr.37, die elterliche Gewalt über ihren Sohn Walter Gebel übertragen. Die Amtsvormundschaft ist damit beendet.

Es wird folgender

Schlußbericht

erstattet. Die Vaterschaft zu dem Kinde konnte nicht festgestellt werden. Als Erzeuger wird von der Kindesmutter der amerikanische Staatsangehörige Molina Tirso Lopez, der früher in der Sheridan-Kaserne in Augsburg stationiert war, beansprucht. Der Genannte kehrte Ende August 1961 nach USA zurück. Seine Heimatanschrift war der Kindesmutter nicht bekannt. Wegen der Feststellung der Vaterschaft wurde das Deutsche Institut für Vormundschaftswesen in Heidelberg, eingeschaltet, das am 18.2.1963 folgendes anher mitgeteilt hat:

" In Ihrer Unterhaltssache Walter Bernhard Gebel / Tirso Molina-Lopez haben sich unsere Korrespondenten in den USA intensiv bemüht, den als Kindesvater benannten Tirso Molina-Lopez zur Anerkennung der Vaterschaft mit Unterhaltsverpflichtungserklärung heranzuziehen. Nachdem der Kindesvater auf die an ihn gerichteten Aufforderungen nicht antwortete, wurde die vorgesetzte Armeedienststelle eingeschaltet. Unter dem 23.1. 1963 erging eine Mitteilung des Departement of the Army, wonach Mr. Molina-Lopez inzwischen aus dem aktiven Militärdienst ausgeschieden ist. Das Armeeministerium vertritt daher die Ansicht, seine Zuständigkeit in dieser Sache sei nicht mehr gegeben. Diese Auffassung entspricht den geltenden US-Vorschriften. Nach diesen Vorschriften ist das Ministerium lediglich dazu angehalten, zu veranlassen, daß dem Kindesvater eine schriftliche Mitteilung in der Sache zugestellt wird. Dies ist geschehen. Der Kindesvater hat jedoch auch darauf nicht reagiert. Die Anschrift von ehemaligen US-Armeeangehörigen wird unter Hinweis

Da der derzeitige Aufenthalt des Kindesvaters nicht bekannt ist, sehen wir uns zu unserem Bedauern ausserstande, weitere Schritte in der Sache zu veranlassen".

Das Amtsgericht Dillingen hat mit Beschluß vom 17.2.1964 - X 51/64, das Kind Walter Gebel der Fürsorgeerziehung überwiesen. Die endgültige Fürsorgeerziehung wurde mit Beschluß vom 25.6.1964 angeordnet. Das Kind wurde am 31.1.1964 im Kinderheim in Wittislingen untergebracht, wo es sich bis 11.7.1966 befand.

Die entstandenen Heimkosten mußten von der Sozialhilfeverwaltung beim Bezirk Schwaben in Augsburg und ab 1.1.1966 vom Landratsamt - Kreisjugendamt Dillingen a.d.Donau übernommen werden. Das der Kindesmutter für ihren Sohn Walter zustehende Kindergeld in Höhe von monatl. 25.-- DM wurde ab Januar 1966 an das Kreisjugendamt Dillingen abgezweigt. Das hier eingegangene Kindergeld in Höhe von insgesamt 150.-- DM wurde vom Kreisjugendamt als Rückersatz für aufgewendete Heimkosten vereinnahmt.

Mit Beschluß des Amtsgerichts Dillingen vom 30.6.1966 wurde die angeordnete Fürsorgeerziehung aufgehoben, da ihr Zweck anderweitig sichergestellt ist. Die Kindesmutter hat sich am 18.3.1966 vor dem Standesamt in Pohl-Göns mit Kasie Lee Lagrand, Angehöriger der US-Streitkräfte, verehelicht. Am 11.7.1966 hat die Kindesmutter ihren Sohn Walter zu sich genommen.

Mündelvermögen wurde nicht verwaltet.

Das Landratsamt - Kreisjugendamt Dillingen versichert die Richtigkeit und Vollständigkeit vorstehender Angaben. Anliegend wird die Bestallungsbescheinigung vom 27.3.1962 zurückgereicht.

Der Amtsvormund
Rieder
(R i e d e r)
Reg.Oberinspektor

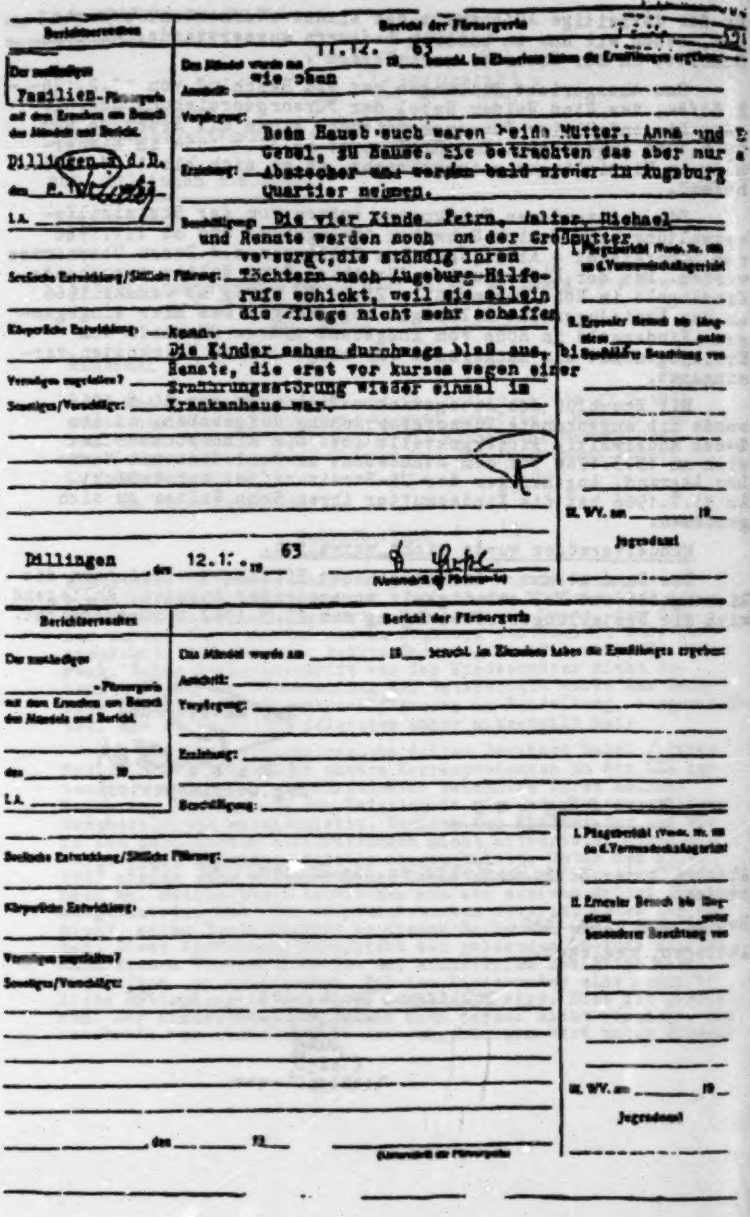
Verfügung:

Abschrift des Schlußberichts an die Kindesmutter übersenden.

Bestallung einziehen.

Austragen, weglegen.

Dillingen/Donau, den [illegible]
Amtsgericht:
([illegible])
Rechtspfleger



Berichtsersuchen

Der zuständigen Familien-Fürsorgerin mit dem Ersuchen um Besuch des Mündels und Bericht.

Dillingen a.d.D.,

den 2. [illegible]

I.A.

Bericht der Fürsorgerin

Das Mündel wurde am 11.12. 19 63 besucht. Im Einzelnen haben die Ermittlungen ergeben:

Anschrift: wie oben

Verpflegung:

Erziehung: Beim Hausbesuch waren beide Mütter, Anna und E Gebel, zu Hause. Sie betrachten das aber nur a Abstecher an, werden bald wieder in Augsburg Quartier nehmen.

Beschäftigung: Die vier Kinde Petra, Walter, Michael und Renate werden noch von der Großmutter versorgt, die ständig ihren

Seelische Entwicklung/Sittliche Führung: Töchtern nach Augsburg Hilferufe schickt, weil sie allein die Pflege nicht mehr schaffen

Körperliche Entwicklung: kann.

Die Kinder sehen durchwegs blaß aus, bi Renate, die erst vor kurzem wegen einer

Vermögen angefallen? Ernährungsstörung wieder einmal im

Sonstiges/Vorschläge: Krankenhaus war.

I. Pflegebericht (Vordr. Nr. 88) an d. Vormundschaftsgericht

II. Erneuter Besuch bis längstens ____ unter besonderer Beachtung von

III. WV. am ____ 19__

Jugendamt

Dillingen, den 12.12. 19 63

(Unterschrift der Fürsorgerin)

Berichtsersuchen

Der zuständigen ____-Fürsorgerin mit dem Ersuchen um Besuch des Mündels und Bericht.

den ____ 19__

I.A. ____

Bericht der Fürsorgerin

Das Mündel wurde am ____ 19__ besucht. Im Einzelnen haben die Ermittlungen ergeben:

Anschrift:

Verpflegung:

Erziehung:

Beschäftigung:

Seelische Entwicklung/Sittliche Führung:

Körperliche Entwicklung:

Vermögen angefallen?

Sonstiges/Vorschläge:

I. Pflegebericht (Vordr. Nr. 88) an d. Vormundschaftsgericht

II. Erneuter Besuch bis längstens ____ unter besonderer Beachtung von

III. WV. am ____ 19__

Jugendamt

____, den ____ 19__

(Unterschrift der Fürsorgerin)

EXHIBIT 16

Copy

Pohl Göns, 06/16/1966

Dear Sir,

First of all, my cordial greetings to you. As you surely remember I appeared in your office once about my 2 children, Petra and Walter.

As I have been married since March 18, I would like to take my children back, so that they will gradually get used to me and their new father. Also, the children will have to learn English now, as I want for them to attend an American school. It will come easier to them now than it would be later. As soon as the children will be part of my home, the Army can prepare the paperwork necessary for my new husband to adopt them. Also, I would then receive child-allowance from the Army. Please send me the necessary adoption papers for my husband to fill out. Furthermore, I must apply for the children's visas, so they will be able to come along with us to America. If the necessary documents cannot be processed in time, the adoption will be handled in America. I will remain here for less than a year. We applied for an American apartment here, but probably will not get one, because we won't be in Germany much longer, and I have been unable to find another apartment; there are none available. Respectfully request, therefore, that you return my children to me--the ones in the Wittislingen Children's Home, Petra and Walter Gebel. You must be glad that I am married now and want my children back. I have a very good husband who will be like a real father to them, something I am observing even now--with my other small son already living with us. I have 2 big rooms, 2 children's beds, and 3 big beds--enough room for the children and me. In many cases there are six people living in two small rooms, and things are working out, and they surely will in my case. Please let me know, whether I may have my children back.

Many thanks in advance.

Yours very truly,

[typed:] signed: Anna Lagrand, nee Gebel

Abschrift

Pohl Göns, den 16.6.1966

Sehr geerter Herr.

Im Anfang meines Schreibens grüße ich Sie recht herzlich. Und möchte Ihnen folgendes mitteilen. Sie wissen doch, das ich schon einmal bei Ihnen war, wegen meinen 2 Kindern Petra und Walter.

Da ich doch jetzt schon seid dem 18.März Verheiratet bin, möchte ich die Kinder zu mir hohlen, damit sie sich langsam an mich gewöhnen und an meinen neuen Vater. Die Kinder müssen jetzt auch Englisch lernen, denn ich möchte sie in die Amischule geben, denn jetzt lernen es die Kinder noch leichter als später. Denn sobald sich die Kinder in meinen Haushalt befinden, dann kann die Armee die Papiere richten, das mein jetziger Mann sie als eigen an nimmt, u. dann bekomme ich auch das Geld von der Armee für die Kinder. Schicken Sie mir doch auch die Papier was ich dazu brauche zur Adoption, damit Sie mein Mann richten kann. Denn ich muß doch auch die Papiere für die Kinder für das Visum richten, damit die Kinder mit nach Amerika können.Wenn die Papiere nicht mehr fertig werden bis dahin, dann kann auch die adoption in Amerika fertig gemacht werden.Denn ich bin ja kein Jahr mehr hier. Ich habe auch wegen den Amerikanischen Wohnungen eingegeben, aber wir bekommen warscheinlich keine solche Wohnugg mehr, weil wir nicht mehr lang in Deutschland haben, u. keine andere Wohnung fand ich noch nicht, es ist keine frei. Daher möchte ich Sie bitten, geben Sie mir meine Kinder raus, die in Wittislingen im Heim sind Petra und Walter Gebel. Denn Sie müssen doch jetzt froh sein, das ich jetzt Verheiratet bin, u.meine Kinder zu mir hohlen möchte. Ich habe einen sehr guten Mann, der ist zu den Kindern bestimmt wie ein eigener Vater, das sehe ich doch, da ich doch meinen anderen kleinen Sohn bei mir habe. Ich habe 2 große Zimmer. u.2 Kinderbetten, u.3 große Betten, da habe ich mit den Kindern schon platz, andere Leute wohnen zu 6 in zwei kleinen Zimmer u.bei denen geht es auch, warum nicht bei mir. Also geben Sie mir Bescheid, ob ich die Kinder hohlen kann.

Im voraus besten Dank.

Hochachtungsvoll
gez.Anna Lagrand geb.Gebel

EXHIBIT 17

[illegible]

Children's Home
8881 Wittislingen

06/20/1966

To: Rural District Office - District Youth Welfare Department
888 Dillingen/Danube
#II/40435/4-18-21/1964
Hö/Wr.

Reference: Status Report on the Gebel Children:
Petra, born 07/21/1960
Walter, born 01/26/1962
Renate, born 05/09/1960
Michael, born 07/18/1961

The Gebel children have been living in Wittislingen since 01/31/1964. Their physical and mental development is normal, and they are healthy.

They enthusiastically attend the local preschool nursery, and the two girls will attend Elementary School beginning in September.

Petra: is a very nervous child and talks excessively. For the rest, she is easygoing, minds, and is good-natured.

Walter: He is full of life, boisterous, and does not mind at all. Particularly conspicuous is his craving for sweets. He continuously begs other children, also grownups, for candy. For the rest, he is good-natured, easygoing, and generally well-liked by the other children.

Renate: is a taciturn child and won't talk much. She minds, is good-natured, and easygoing.

Michael: Curiosity, jealousy, and hypersensitivity play a major role. On the other hand--like all of the Gebel children--he is very good-natured and easygoing.

The children are very much attached to one another. They like their stay in our Home and are a pleasure to have around, especially the two girls.

Director in Charge of Home

EXHIBIT 18

[Translation from German]

County Court of Dillingen
on the Danube
- Guardianship Court -

Dillingen/Danube, 07/11/66

File Reference: VII 126/62

In the case of

a) Gebel, Petra, born 07/21/1960
b) Gebel, Walter, born 01/26/1962
c) Gebel, Karl-Heinz, [born] 10/10/1963.

Mrs. Emma Lagrand, nee Gebel, residing at #37 Windhofstr. in Pohl-Göns, the children's mother--identified by her knowledge of the facts underlying this case.

Mrs. Emma Lagrand declared:

On 03/18/1966, I entered into matrimony with Sergeant Masie Lee Lagrand, a member of the US Military Forces, before the Magistrate of Pohl-Göns.

As a result of my marriage, my personal circumstances have improved decisively. I am now in a position to receive my children into my home and raise them properly. My husband has agreed to accept my children into our matrimonial home. He wishes to adopt the children, as soon as circumstances permit.

On 01/02/1967, I will emigrate to the USA with my husband and my children.

Therefore, I request that parental custody of the above-mentioned children be restored to me.

My being awarded parental custody will be in the children's best interest, as continued guardianship following my emigration to the USA would entail major difficulties.

The District Youth Welfare Office of Dillingen/Danube has given its consent to the above arrangement.

r.a.& s.[=read, approved & signed]

[signed:] Emma Lagrand

Closed [by]:

[signed:] Wigl
(Wigl)
Reviewing Judicial Inspector

Aktenzeichen: VII 126/66

In Sachen

a) Gebel Petra, geb. 21.7.1960
b) Gebel Walter, geb. 26.1.1962
c) Gebel Karl-Heinz, 10.10.1963

findet sich die Kindsmutter Frau Emma Lagrand, geb. Gebel, wohnh. in Pohl-Göns, Windhofstr. 37, ausgewiesen durch Sachkenntnis,

Frau Emma Lagrand erklärte:

Ich habe mich am 18.3.1966 vor dem Standesamt in Pohl-Göns mit dem Sergeant der US-Streitkräfte Masie Lee Lagrand verheiratet.

Infolge meiner Verehelichung haben sich meine persönlichen Verhältnisse entscheidend verbessert. Ich bin nunmehr in der Lage, die Kinder in meinen Haushalt aufzunehmen und sie ordentlich zu erziehen. Mein Ehemann ist mit der Aufnahme meiner Kinder in den ehel. Haushalt einverstanden. Er will die Kinder adoptieren, sobald die Voraussetzungen geschaffen sind.

Ich wandere am 2.1. 1967 mit meinem Ehemann und meinen Kinder in die USA aus.

Aus diesen Gründen stelle ich den

Antrag

die elterliche Gewalt über meine oben aufgeführten Kinder auf mich zu übertragen.

Die Übertragung der elterlichen Gewalt auf mich dient dem Besten der Kinder, da die Weiterführung der Vormundschaft nach meiner Auswanderung nach den USA mit größten Schwierigkeiten verbunden sein würde.

Das Kreisjugendamt Dillingen/Do. ist mit dieser Regelung einverstanden

v.g.u.u.

Geschlossen: Emma Lagrand

(W[illegible])
Just.Insp.zA.

EXHIBIT 19

COPY

Rural District Office
Dillingen on the Danube

888 Dillingen on the Danube, 07/05/1966
Phone: 455, 456, 457.

II/4-432/27-1426+1578 R/B
(to be referred to in your reply)

To: The County Court
- Guardianship Court -

888 Dillingen

Reference: Public Guardianship pertaining to:
Gobel, Petra Christine, born 07/21/1960 &
Gobel, Walter Bernhard, born 01/26/1962.

Subject: Transfer of full parental custody to children's mother, Emma Lagrand, nee Gobel, residing in Pohl-Göns, District of Friedberg/Hesse

The District Youth Welfare Office of Dillingen is the public guardian of both aforementioned children. As a result of neglect, their transfer into the custody of public welfare became necessary. Note: Court Order #X 51/64, issued on 02/17/1964.

In the meantime, the children's mother got married. Some time ago she appeared before the District Youth Welfare Office in Dillingen requesting the return of her children from the Wittislingen Children's Home into her care, claiming that her husband was willing to accept them into his home. Another illegitimate child whose guardian is the Municipal Youth Office in Augsburg, is already a member of her household.

An inquiry conducted within the community of her present residence revealed nothing detrimental about her. At this point she is obviously ready to care for her children properly, having sufficient time at her disposal to do so, since she has found a husband.

The children's mother's husband, Mr. Masie Lee Lagrand is a member of the US Armed Forces stationed in Germany. He is due to be transferred back to the United States in the beginning of next year, which is a determining factor as regards the children's return. Mr. Lagrand is willing to accept the children into his household and--according to their mother--even to adopt them. While the latter still remains an open issue, Mrs. Lagrand definitely intends to take both children with her to the United States. With the children no longer living in Germany, continued guardianship would be a mere formality.

Therefore, request transfer of full parental custody to the mother, Mrs. Emma Lagrand. An application, dated 06/27/1966, for

rescinding custody by Public Welfare has already been filed with the County Court in Dillingen.

Public Guardian

s/ Rieder
(Rieder)
Officiating Chief Inspector

[Handwritten:]

I. Court Order.

Parental custody of Gebel, Walter Bernhard, born 01/26/1962 in Dillingen/Danube, is to be transferred to the mother, Mrs. Emma Legrand, nee Gebel, in Pohl-Gö s, District of Friedberg/Hesse.

[Initials] II. Individuals to be notified of Section I, above:

1 copy to child's mother,
2 copies to District Youth Welfare Office,

[Initials] III. 4th copy for the records of Judicial Officer.

Dillingen, 07/27/1966
County Court
[signed:] Wagenhuber

No fee, §§44/I,4, 91

[Stamp:] Dillingen/Danube, [date missing]
Finance Officer
[signature illegible]
Reviewed/Judicial Inspector

Landratsamt
Dillingen a. d. Donau

888 Dillingen a. d. , 6, den 5.7.1966
Fernruf Nr. [illegible], 454, [illegible].

Nr.: II/4-432/27-1426+1578 R/B
(Bei Antwort bitte angeben)

An das
Amtsgericht
-Vormundschaftsgericht-

888 Dillingen

Betreff: Amtsvormundschaft über
Gebel Petra Christine, geb. 21. 7. 1960 u.
Gebel Walter Bernhard, geb. 26. 1. 1962;

hier: Übertragung der vollen elterlichen Gewalt
auf die Kindesmutter, Emma Lagrand, geb. Gebel,
wohnhaft in Pohl-Göns, Kreis Friedberg/Hessen

Das Kreisjugendamt Dillingen führt über die beiden o.g. Kinder die Amtsvormundschaft. Wegen Vernachlässigung der Kinder wurde erforderlich, daß diese der Fürsorgeerziehung überwiesen wurden. Auf den Beschluß des Amtsgerichtes Dillingen vom 17.2.1964 - X 51/64 - wird Bezug genommen.

Zwischenzeitlich hat sich die Kindesmutter nunmehr verheiratet. Sie war bereits vor einiger Zeit beim Kreisjugendamt Dillingen vorstellig geworden und bat, daß ihr, die im Kinderheim in Wittislingen untergebrachten Kinder wieder zurückgegeben würden, da ihr Ehemann bereit sei, diese in seinen Haushalt aufzunehmen. Ein weiteres uneheliches Kind, für das das Stadtjugendamt Augsburg die Vormundschaft führte, befindet sich bereits in ihrem Haushalt.

Die Erhebungen über die zuständige Wohnsitzgemeinde ergaben über die Kindesmutter nichts Nachteiliges. Offensichtlich ist sie jetzt bereit, ihre Kinder ordnungsgemäß zu versorgen und findet hierzu die nötige Zeit, da sie nunmehr einen Ehemann gefunden hat.

Der Ehemann der Kindesmutter, Herr Masie Lee Lagrand ist Angehöriger der US-Streitkräfte in Deutschland. Er soll zu Beginn des kommenden Jahres wieder in die Staaten zurückversetzt werden. Dieser Umstand ist auch für die Rückgabe der Kinder mitbestimmend. Herr Lagrand ist bereit, die Kinder in seinen Haushalt aufzunehmen und - nach den Angaben der Mutter - sie sogar zu adoptieren. Wenn auch letzteres noch offen steht, so dürfte doch wohl bereits feststehen, daß Frau Lagrand ihre beiden o.g. Kinder mit in die Staaten nehmen will. Die Weiterführung der Vormundschaft wäre daher nunmehr eine Formsache, da die Kinder nicht mehr in Deutschland sind.

Demzufolge wird beantragt, der Mutter, Frau Emma Lagrand, die volle elterliche Gewalt zu übertragen. Die Aufhebung der bestehenden Fürsorgeerziehung wurde beim Amtsgericht Dillingen bereits mit Schreiben vom 27.6.1966 beantragt.

Der Amtsvormund

gez. Rieder

(Rieder)
Reg. Oberinspektor

I. Beschluß

Die elterliche Gewalt über Gebel Walter Bernhard, geboren am 26.1.1956 in Dillingen/Donau, wird der Mutter, Frau Emma Lagrand, geb. Gebel, in Pohl-Göns, Kreis Friedberg in Hessen, übertragen.

B.

II. Mitt. v. I an 1. Kindesmutter,
2. Kreisjugendamt hier,

juli.1966

III. W. Rechtspflege z. w. Veranl.

Dillingen, 27. VII. 1966
Amtsgericht

Geb. frei §§ 94/I, 4, 91 KostO.

Dillingen/Donau, den
Der Kostenbeamte:
Justizinspektor z. A.

EXHIBIT 20

District Rural Office
Dillingen on the Danube
888 Dillingen/Danube, 10/14/1966

Phone: 455, 456 457.

II/4-432/27-1578 hö/wR.
(to be referred to in any reply) [SEAL:] County Court
October 19, 1966
Dillingen (Danube)

To: County Court
- Guardianship Court -

888 Dillingen on the Danube

Reference: Guardianship/Walter Bernhard Gebel,
born 01/26/1962
Your file reference: VII 126/62

Enclosure: - 1 -

Pursuant to Court Order dated 07/27/1966, issued by the County Court of Dillingen, parental custody of son Walter Gebel has been turned over to his mother, Mrs.Emma Lagrand, nee Gebel, residing at #6309 Windhofstr. in Pohl-Göns, which terminates the public guardianship status. The following is a

Conclusive Report

Child's paternal affiliation could not be established. The child's mother claims US Citizen Molina Tirso Lopez, formerly stationed at Sheridan-Barracks, Augsburg, to be the father. Said individual returned to the United States in August of 1961. The child's mother did not know his home address. In order to determine paternal affiliation, the German Guardianship Institute in Heidelberg was contacted, which on 02/18/1963 provided the following information:

"Re: child support case of Walter Bernhard Gebel/ Tirso Molina-Lopez; our correspondents in the USA made concentrated efforts to approach Tirso Molina Lopez, named as the child's father, about his acknowledging paternity and responsibility for child support. When he failed to respond to any such request, his Army superiors were contacted. According to information dated 01/23/1963, received from the Department of the Army, Mr. Molina-Lopez has been discharged from active military service. Therefore, under the provisions of existing US regulations, the Department of the Army feels, it no longer has any jurisdiction over this case. The only responsibility incumbent upon the Department of the Army is to send a written notification about the matter to the child's father, which it did; however, again the child's father failed to respond. In consideration of confidentiality with respect to personnel files, to be unable to proceed any further in this matter."

Pursuant to Court Order X 51/64, dated 02/17/1964, issued by the County Court of Dillingen, the child Walter Gebel was delivered into the custody of Public Welfare. Permanent custidy by public welfare was ordered on 06/25/1964. The boy was admitted into the Wittislingen Children's Home, where he remained until 07/11/1966.

Expenses incurred for the care in the Children's Home had to be covered by the Social Assistance Department of the District of Swabia in Augsburg and effective 01/01/1966 by the Rural District Office/District Youth Welfare Office in Dillingen on the Danube. Beginning in January 1966, the monthly child support of DM 25.00, to which the child's mother was entitled for her son Walter, was channeled into the District Youth Welfare Office. The monthly sum of DM 150.00 in child support received by this office was turned over to the District Youth Welfare Office as reimbursement for expenses incurred by the Children's Home.

A court order issued by the County Court of Dillingen on 06/30.1966, rescinded the previous order for public-welfare care, since circumstances had changed. On 03/18.1966, the child's mother entered into matrimony with Masie Lee Lagrand, member of the US Armed Forces, before the Magistrate in Pohl-Göns. On 07/11/1966, Walter was returned to his mother.

There was no ward-estate in trust.

The Rural District Office-District Youth Welfare Office attests the correctness and completeness of the above information. Enclosed, we return the Certificate of Appointment, dated 03/27/1962.

Public Guardian

[signed:] Rieder
(Rieder)
Officiating Chief Inspector

Disposition

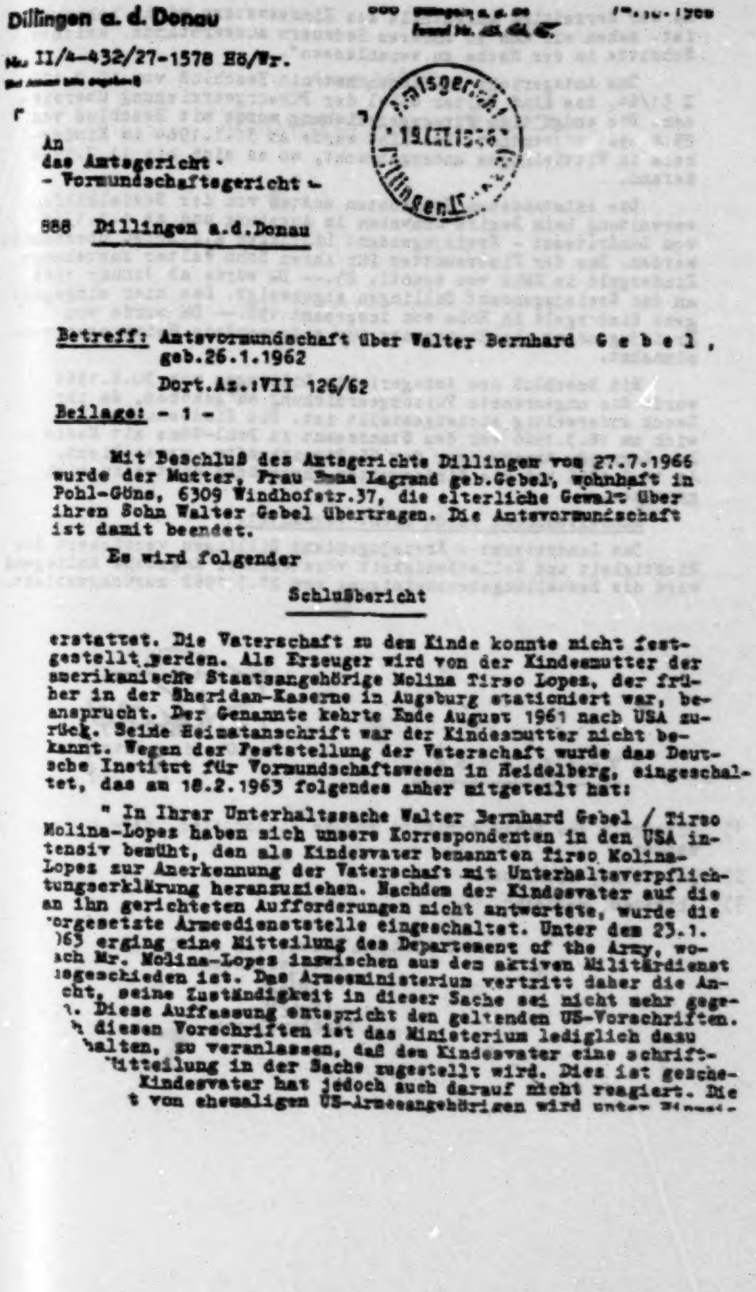
1) Copy of the Final Report to be send to the child's mother;

2) affix appointment coupon;

3) close out file and keep on record.

Dillingen/Danube, 10/21/1966
County Court

[signed:] Teigl
(Teigl)
Judicial Officer



Dillingen a. d. Donau 8880 [illegible] [illegible].10.1966
[illegible]

Nr. II/4-432/27-1578 Hö/Wr.
[illegible]

Amtsgericht
19.[illegible]1966
Dillingen

An
das Amtsgericht -
- Vormundschaftsgericht -

888 Dillingen a.d.Donau

Betreff: Amtsvormundschaft über Walter Bernhard Gebel, geb.26.1.1962

Dort.Az.:VII 126/62

Beilage: - 1 -

Mit Beschluß des Amtsgerichts Dillingen vom 27.7.1966 wurde der Mutter, Frau Emma Legrand geb.Gebel, wohnhaft in Pohl-Göns, 6309 Windhofstr.37, die elterliche Gewalt über ihren Sohn Walter Gebel übertragen. Die Amtsvormundschaft ist damit beendet.

Es wird folgender

Schlußbericht

erstattet. Die Vaterschaft zu dem Kinde konnte nicht festgestellt werden. Als Erzeuger wird von der Kindesmutter der amerikanische Staatsangehörige Molina Tirso Lopez, der früher in der Sheridan-Kaserne in Augsburg stationiert war, beansprucht. Der Genannte kehrte Ende August 1961 nach USA zurück. Seine Heimatanschrift war der Kindesmutter nicht bekannt. Wegen der Feststellung der Vaterschaft wurde das Deutsche Institut für Vormundschaftswesen in Heidelberg, eingeschaltet, das am 18.2.1963 folgendes anher mitgeteilt hat:

" In Ihrer Unterhaltssache Walter Bernhard Gebel / Tirso Molina-Lopez haben sich unsere Korrespondenten in den USA intensiv bemüht, den als Kindesvater benannten Tirso Molina-Lopez zur Anerkennung der Vaterschaft mit Unterhaltsverpflichtungserklärung heranzuziehen. Nachdem der Kindesvater auf die an ihn gerichteten Aufforderungen nicht antwortete, wurde die
orgesetzte Armeedienststelle eingeschaltet. Unter dem 23.1.
)63 erging eine Mitteilung des Departement of the Army, wo-
ach Mr. Molina-Lopez inzwischen aus dem aktiven Militärdienst
sgeschieden ist. Das Armeeministerium vertritt daher die An-
cht, seine Zuständigkeit in dieser Sache sei nicht mehr gege-
. Diese Auffassung entspricht den geltenden US-Vorschriften.
diesen Vorschriften ist das Ministerium lediglich dazu
halten, zu veranlassen, daß dem Kindesvater eine schrift-
itteilung in der Sache zugestellt wird. Dies ist gesche-
Kindesvater hat jedoch auch darauf nicht reagiert. Die
t von ehemaligen US-Armeeangehörigen wird unter [illegible]

Da der derzeitige Aufenthalt des Kindesvaters nicht bekannt ist, sehen wir uns zu unserem Bedauern ausserstande, weitere Schritte in der Sache zu veranlassen".

Das Amtsgericht Dillingen hat mit Beschluß vom [illegible].2.196[illegible] - X 51/64, das Kind Walter Gebel der Fürsorgeerziehung überwiesen. Die endgültige Fürsorgeerziehung wurde mit Beschluß von 25.6.1964 angeordnet. Das Kind wurde am 31.1.1964 im Kinderheim in Wittislingen untergebracht, wo es sich bis 11.7.1966 befand.

Die entstandenen Heimkosten mußten von der Sozialhilfeverwaltung beim Bezirk Schwaben in Augsburg und ab 1.1.1966 vom Landratsamt - Kreisjugendamt Dillingen a.d.Donau übernommen werden. Das der Kindesmutter für ihren Sohn Walter zustehende Kindergeld in Höhe von monatl. 25.-- DM wurde ab Januar 1966 an das Kreisjugendamt Dillingen abgezweigt. Das hier eingegangene Kindergeld in Höhe von insgesamt 150.-- DM wurde vom Kreisjugendamt als Rückersatz für aufgewendete Heimkosten vereinnahmt.

Mit Beschluß des Amtsgerichts Dillingen vom 30.6.1966 wurde die angeordnete Fürsorgeerziehung aufgehoben, da ihr Zweck anderweitig sichergestellt ist. Die Kindesmutter hat sich am 18.3.1966 vor dem Standesamt in Pohl-Göns mit Masie Lee Lagrand, Angehöriger der US-Streitkräfte, verehelicht. Am 11.7.1966 hat die Kindesmutter ihren Sohn Walter zu sich genommen.

Mündelvermögen wurde nicht verwaltet.

Das Landratsamt - Kreisjugendamt Dillingen versichert die Richtigkeit und Vollständigkeit vorstehender Angaben. Anliegend wird die Bestallungsbescheinigung vom 27.3.1962 zurückgereicht.

Der Amtsvormund
Rieder
(R i e d e r)
Reg.Oberinspektor

Verfügung:

1) Abschrift des Schlußberichts an die Kindesmutter übersenden.
2) Bestallung einkleben.
3) Abtragen, weglegen.

Dillingen/Donau, den 2[illegible].10.[illegible]
Amtsgericht:
([illegible])
Rechtspfleger

Annex MG 52

AFFIDAVIT OF KELLEY HENRY

STATE OF ARIZONA)
)
County of Pima)

I, KELLEY HENRY, upon my oath depose and state as follows:

1. I am an attorney at the Office of the Federal Public Defender in Tucson, Arizona. I am licensed to practice law in the State of Missouri. I am admitted to practice law in the State of Missouri, the United States District Courts for the Western District of Missouri and the District of Arizona, and the Ninth Circuit Court of Appeals. I have represented men charged with capital crimes in Missouri and Arizona. I have lectured at the national and state level on issues regarding the death penalty. My office was appointed to represent Walter LaGrand on February 26, 1999. In that capacity we immediately began a background investigation of Walter LaGrand and prepared and filed several state and federal petitions on his behalf.

2. During the time that I represented Walter LaGrand, the German government was also working extensively on his behalf. For example, the German Ambassador, Dr. Jürgen Chrobog, made a personal plea to Governor Jane D. Hull on Walter's behalf. In addition, German officials met with the clemency board and visited with Walter.

3. German consular assistance would have been essential to collecting mitigating evidence for Karl and Walter LaGrand before their sentencing hearing in 1984. Much of the available evidence was located in state agencies, therefore governmental assistance was necessary to cut through bureaucratic obstacles and access the records. The German government did help collect important background records located in Germany for Walter LaGrand in 1993. My office filed these documents as exhibits to Walter's Third Petition for Postconviction Relief, filed on March 2, 1999.

4. The background records obtained with Germany's assistance in 1993 were important not only in and of themselves, but also because they led to the collection of significant mitigating evidence in the United States. Because of vital statistics contained in those records, my office was able to locate Walter's biological and adoptive fathers. Both men readily signed affidavits in support of Walter's petition. Walter's biological father provided critical information regarding the behavior of Walter's mother - including the fact that she drank while she was pregnant with Walter.

5. German consular assistance would also have been crucial in developing evidence regarding the effects of racism and cultural isolation on Walter and Karl, both biracial children of different fathers, born to an unwed German mother in Germany in the early 1960's. Competent trial counsel would have looked to Germany for assistance in locating social historians and academic scholarship to support this line of mitigating evidence. If my office had had more time, we would have worked with the German consulate to develop this argument which we considered important and compelling.

6. Had their trial counsel presented a complete case for mitigation, the LaGrands likely would not have been sentenced to death. Their crime, as opposed to serial murders or other particularly heinous crimes, was the type of offense for which a strong case for mitigation is often successful in avoiding the death penalty. Consequently, here, the importance of investigating, developing and presenting a complete case at sentencing was paramount.

Affiant further sayeth not.

Dated this 18th day of August, 1999.

Kelley J. Henry
Kelley Henry

SUBSCRIBED AND SWORN TO me
this 18th day of August, 1999.

Notary Public

SOPHIA BECKMAN

Annex MG 53

AFFIDAVIT OF JEANNETTE LAURA SHELDON

DECLARATION OF JEANNETTE LAURA SHELDON

I, Jeannette L. Sheldon, declare as follows,

1. I am an investigator for the Office of the Federal Public Defender's Capital Habeas Unit. On February 28, 1999, I interviewed Weaver James Barkman, Jr. in Tucson, Arizona.

2. Mr. Barkman told me that he is a former Deputy Sheriff for the Pima County Sheriff's Department in Tucson. He said he was employed by the Pima County Sheriff's Department for over 14 years. During his service to the Sheriff's Department, he worked as a uniformed officer, a detective, and a member of the Intelligence Unit.

2. Mr. Barkman told me that in January of 1982, while working in the Intelligence unit, he interviewed Karl Lagrand twice about a bank robbery which had occurred some hours earlier in Marana, AZ.

3. On both occasions, Mr. Barkman said that Karl Lagrand said that Karl and his brother, Walter, had planned to rob the bank together. Mr. Barkman said that Karl also told him that Karl and Walter had planned that no one would get hurt during the robbery.

4. Mr. Barkman explained that, in both interviews be conducted with Karl in January of 1982, Karl was extremely upset. Mr. Barkman said that Karl said that he alone had killed the bank manager and stabbed Dawn Lopez. Mr. Badkman remembered that Karl repeated the exact story in each confession, and each time Karl stated he alone was responsible for the attacks.

5. Based on his skill and experience in conducting such interviews, Mr. Barkman told me that, throughout the interviews, he found no reason to disbelieve Mr. LaGrand's rendition of the events in the bank.

6. Mr. Barkman said that this case has always disturbed him because, in all of his years of experience as a law enforcement officer, and in his experience investigating many violent crimes, he has never considered this particular crime to warrant the death penalty.

7. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated this 3'1 day of March 1999.

Jeannette L. Sheldon

Annex MG 54

AFFIDAVIT OF TIRSO MOLINA LOPEZ

Declaration of Tirso Molina Lopez

I, Tirso Molina Lopez declare under penalty of perjury the following to be true to the best of my information and belief:

1. My name is Tirso Molina Lopez and I am the biological father of Walter Bernhard LaGrand. Presently, I reside in Las Vegas, Nevada.

2. I was born in 1941 in Puerto Rico. My parents, Maria Lopez and Thomas Molina, were never married. My paternal aunt, Maria Molina, helped raise me. She died approximately seventeen years ago of natural causes.

3. My father was in the Merchant Marines and traveled extensively for work. He died approximately twenty years ago from a heart attack.

4. I was raised by my father. We lived in Puerto Rico until I was three years old and moved to New York.

5. On my father's side I have two siblings: a younger sister named Lisa Molina who is a housewife and lives in Puerto Rico and a younger brother named Thomas Molina who works as a security guard and lives in Las Vegas. I am not in touch with Lisa but I occasionally see Thomas.

6. On my mother's side I have two older sisters: Analda Perez who lives in Florida and Fatima Negron who lives in New Jersey. They are both retired.

7. While I was growing up, my mother had no contact with me. No one ever explained to me why she had nothing to do with me.

8 When I was six or seven years old my father married a woman named Maria Gonzalez. They were married in Puerto Rico.

9. When I was seven years old I was sent to live at the St. Agnes reformatory home in Sparkhill, New York. My first-cousin, Thomas, was also sent to the home. Thomas and I were

very close -- he was almost like a brother to me. Thomas passed away ten to twelve years ago.

10. I spent five years at the St. Agnes home. The home was run by nuns and the children were divided into three groups based on age. When I arrived at the home I was in the youngest group of boys. There were approximately five hundred boys at St. Agnes. The nuns were strict -- and disciplined me by hitting me with a bamboo stick that had tape on it. Sometimes a nun would bend you over and hit you or she would hit you on your fingertips with a ruler. I was hit pretty frequently.

11. During the time that I was at St. Agnes I did not go home for visits. However, my father and step-mother did visit me. I saw my father approximately every three months -- whenever he was back from a trip. My step-mother visited me every two weeks.

12. I left St. Agnes when I was about twelve. Thomas and I returned to New York and I lived with my father and step-mother. I still hung around on the streets. I attended school but I did not like it. I was a C and D student. A few years later my family moved back to Puerto Rico.

13. We moved to Caraguena, the town that my father's family is from. Since we were back in Puerto Rico I asked my father if I could see my biological mother. He agreed and took me to Guayama to meet her. When we got up to Guayama, my mother was no longer living there. We met her mother who told us that she lived in New Jersey and that she had been in New York all that time.

14. I enlisted in the Army when I was seventeen. I knew that troops from Puerto Rico were being sent to New Jersey. Part of the reason I joined was to be able to see my mother in New Jersey.

15. When I was stationed at Ft. Dix in New Jersey I did meet my mom. She came to my camp around midnight. I did not have any feelings for her when I met her -- there was no

connection or attachment. In a way, it was disappointing to meet her because she also did not seem to feel anything for me. She came up to see me some weekends and I sometimes went down and stayed with her. However, there was not much connection between us; I did not have a bond with her.

16. I was in the Army for two years. From Ft. Dix I went to the Aberdeen proving grounds and from there I was sent to Germany. I did not like the army.

17. In 1961 I was stationed in Augsburg, Germany for nine months. I worked as a supply specialist, which meant that I issued and took back all of the gear for soldiers coming into and going out of Germany. I lived on the military base during this time.

18. I was in Germany for three or four months before I met Emma Gebel. I met Emma when she was with a group of friends in a restaurant in Augsburg. I was between the age of 18 and twenty when I met her and she was around the same age. We started talking and then began going out on weekends. We would go to dances and bars. Emma did not use drugs but she did drink beer.

19. Emma told me that she was from another town that was out in the country. During the time that I knew her she stayed in an apartment in Augsburg with one of her girlfriends. I do not remember the name of her friend. Emma bounced back and forth between the apartment and the town that she was from originally. She would be gone for a few days at a time.

20. I did not know anything about Emma or her family. I went out with Emma for five or six months total. Emma and I dated for a couple of weeks before we had sex. When we did have sex and go out, I would give her money – $20 or $30, whatever I had. She did not ask me for the money but I figured that she might need it. I thought she could use the money because her clothes were used and she did not seem to be in really good health. She would say that she was

fine but she seemed to be depressed a lot of the time. I would ask her what was wrong but she would never tell me anything and I didn't want to push her. Emma would just turn off and be quiet at times.

21. During the time that Emma and I saw each other she did not work. I do not think that she was seeing anyone else during this time. We saw each other mostly on the weekends, Saturday nights generally. I would take the trolley and meet her down at a local bar.

22. During the time that I dated Emma, she started to gain weight. She told me that she was going to have a baby.

23. When Emma was four or five months pregnant she said that the baby was mine. I felt that there was no way because we hadn't been together that long. I do not think that Emma was seeing anyone else romantically during this period of time. This would, in fact, make me the father of this baby.

24. I was never contacted by attorneys or investigators appointed to represent my son, Walter, at trial, on direct appeal or in post-conviction proceedings. Had any attorney or investigator contacted me, I would have disclosed the information stated in this declaration as well as other information.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 2 nd day of March, 1999.

Tirso Molina

Tirso Molina Lopez

Annex MG 55

AFFIDAVIT OF MASIE LEE LAGRAND

DECLARATION OF MASIE LEE LaGRAND

Masie Lee LaGrand declares under penalty of perjury, the following to be true to the best of his information and belief:

1. My name is Masie Lee LaGrand. I am a Reverend at the New Hope CME Church Christian, Methodist Episcopal. I have been a Reverend since 1981.

2. I have lived in Alabama since 1974. I currently live at 751 Railroad Street, Hurtsboro, Alabama.

3. I joined the U.S. Army in 1963 when I was nineteen years old as a Private, first class, and served in the 24th Infantry Division.

4. In 1964, while stationed in Augsburg, Germany, I met a woman by the name of Emma, who was working as a waitress at an off-post bar.

5. I became intimately involved with Emma because I was young and very lonely. I was mostly interested in a sexual relationship. Emma was approximately two years older than I. We were together for two years before we were married.

6. I married Emma in 1966, in Germany. I knew at that time that she had a child, Karl, who was in an adoption type of home. I did not know why he was in that home. Emma did not explain why. I was not aware that Emma had other children because she never mentioned it. I naturally assumed that Karl was her only child. We visited Karl three or four times, before we married. From 1964 to 1966, I did not know about Walter and Patricia. They were in the same adoption home, but separate from Karl. After our marriage, we brought Karl home to live with us as a family.

7. When Karl was in the foster home, he appeared shaky, abnormal, and seemed to suffer from some sort of involuntary shaking of his head, which he would often do, even during sleep. This behavior continued even after we brought him home. Emma told me she took him to the doctor regarding this condition but I did not believe her.

8. Emma never told me who Karl's father was. I do not believe that he and Emma were married.

9. After our marriage in 1966, I was ordered to training exercises in the field which took me away from my home for thirty days. Upon my return, I was shocked to discover that Emma had two other children living in our house. Emma told me that they were her children also but she never explained where they came from. I now had four dependants that I could not afford, particularly since Emma was no longer working. She later told me that Walter's father was a "Mexican." I was told that Patricia was purely German, and that her father had been a German Soldier.

10. Because of the added responsibility of additional two children, life became financially very difficult. In spite of this, Emma quit her waitress job to stay at home. During this time, we were living in the town of Augsburg, outside the benefit of the military base.

11. Our marriage started beautifully, as Emma and I got along very well together. However, it eventually became clear to me over time that Emma's lifestyle did not wholly match mine. For instance, although Emma no longer worked at the NCO club, she would very often go there to meet friends and have a good time. I would stay at home babysitting her children. Emma did not take very good care of her children, especially Karl and Walter. She paid a disportionate amount of attention to her daughter in comparison to the attention she gave to her sons. I would very often tell her that she needed to love the boys as she did Patricia, but she never listened. In fact, Emma was often verbally abusive to Karl and Walter, comparing them to Patricia and taunting them that neither one would ever amount to much. Emma seemed completely unconcerned about the welfare of her two sons. The combination of these factors, especially her abuse of the boys, soured our marriage and escalated our constant arguments into disaster.

12. Emma did not keep our home clean or the boys clean. Our home was always dirty, and unkept. During my work-related absences, the boys were dirty and unruly. However, Patricia was always well dressed and clean. I don't think that Emma was fully to herself. She would occasionally wash and clean but when a spell came, she would only take care of Patricia and ignore the boys.

13. I was transferred to Ft. Benning Georgia and moved my family with me. Before Karl started school, I sent Karl to live with my mother in Hatchechubbee, Alabama, as he was very young and I wanted him under my mother's care. Karl lived with my mother for one year and during this time I noticed a positive change in Karl, an improved and better attitude. Walter and Patricia stayed behind because they were old enough to attend school. Walter did considerably well and was attentive in school It was only when his mother's anger flared up that his behavior would worsen. During my field exercises, which took me away from the home for periods of time, the boys were neglected. Emma was not taking care of them, and mostly left them to take care of themselves, even at a very young age. Many times, the boys tried to escape Emma's horrible treatment of them. I remember several occasions in which the boys ran away from home and I had to go to the Police to help me locate them. The boys said they ran away because of the abusive treatment from their mother. Patricia was also verbally abusive to the boys. I often had to play the role of mediator between Emma, Patricia, and the boys. I always believed that the constant verbal abuse from Patricia, Emma, and the glaring absence of love and concern from their mother was terribly harmful to the boys.

14. During the next few years, the Army transferred me to Army posts in Texas, Arizona, and a return to Germany. I also completed two tours in Viet Nam. During my absences, I always sent Emma money to support our family and I believed that the money went to support our family. However, I always returned home to find that Emma had not used the money I sent to her for housekeeping purposes instead, she spent it on other things. Also, Emma had deeply indebted us through her carelessness with our money. Still, Emma continued to go to bars at night. During one period when I had returned to Germany, Emma and the children stayed

behind at Ft. Huachuca in Arizona. I frequently received notices and letters about the mounting debt Emma had built. I became very worried because I felt that would affect my Army career. I requested emergency leave status and got permission to escort two prisoners to Ft. Riley, Kansas. I paid my own way to Ft. Huachuca. I had not told Emma that I was coming home. I found out when I returned home that the boys were in the Arizona Boys Ranch. Our home was in shambles with girls' and mens' clothing scattered around. I discovered that Emma was a cocktail waitress at the NCO club, and carrying on with other men. I began to ask around the base about the children. A Major at the base had apparently taken an interest in the welfare of the boys and tried to get them into Church. He advised me to separate from Emma and to take custody of the boys. I decided to give Emma another chance, and returned to Germany to secure quarters for our family.

15. Back in Germany, we lived together again as a family. However, Emma was still going out to bars at night and gambling. I was trying to keep our family intact and make a go of our marriage, but regularly Emma was seeing other men, as I discovered in a letter from another man to Emma in which he joked about the good time they had spending my money. I confronted Emma with this letter. Later that night when she returned from Bingo, she attempted to stab me while I was sleeping with a sword she had just won at Bingo. She would have seriously wounded me had I not woken up and protected myself by pushing her out of a window.

16. All these events escalated to a point where my career was seriously compromised. In 1974, I was discharged from the Army because of the ongoing marital fights and history of indebtedness.

17. Emma and I were divorced in 1974. After that, I moved to Alabama where my family lived. I have not heard from or seen Emma or the children since the sword episode except through correspondence from Emma's attorneys. My mother remained in contact with Emma until her death in 1997.

18. After my divorce from Emma, the separation from her and the children, and my discharge from the Army, I suffered a nervous breakdown.

19. The news of Karl's and Walter's situation has saddened and hurt me very much, as I always cared for and wondered how they would do without me. I strongly believe that the combined abuse by Emma and Patricia put those boys to death. Had an attorney representing Walter contacted me at any time, I would have told him or her the information contained in this declaration.

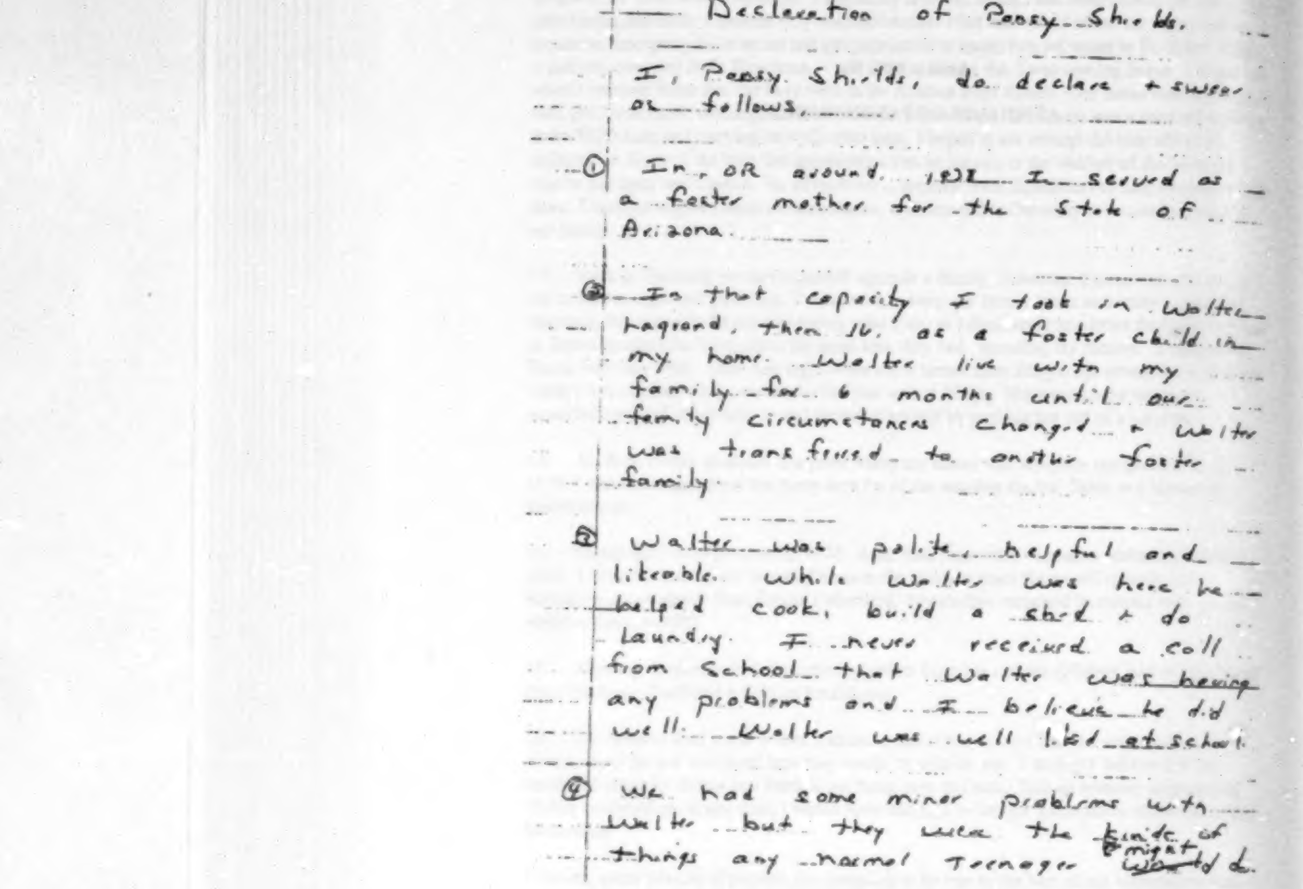
I declare, under penalty of perjury, the foregoing to be true to the best of my information and belief.

Dated this 1 day of March, 1999.

Marie L. LaGrand
Marie L. LaGrand

Annex MG 56

AFFIDAVIT OF PANSY SHIELDS



Declaration of Pansy Shields.

I, Pansy Shields, do declare + swear as follows.

① In, OR around 1982 I served as a foster mother for the State of Arizona.

② In that capacity I took in Walter Lagrand, then 16, as a foster child in my home. Walter live with my family for 6 months until our family circumstances changed + Walter was transferred to another foster family.

③ Walter was polite, helpful and likeable. While Walter was here he helped cook, build a shed + do laundry. I never received a call from School that Walter was having any problems and I believe he did well. Walter was well liked at school.

④ We had some minor problems with Walter but they were the kinds of things any normal Teenager ~~would~~ might do.

⑤ While Walter lived with us he needed a lot of attention. By that I mean, he always wanted to be right with me. He always wanted to talk to me. He seemed happier when he was with me. I felt he needed the attention.

⑥ While Walter was with us he tried to find his father. We were never able to find him. He had never known his father. Walter's mother never called OR came to see him while he was with us even though Walter tried to call her. I felt sorry for him he never had the love of a mom or dad.

⑦ Walter told me his mother was a prostitute & entertained different men. Walter said he was not allowed in the house when he was at his mother's because she would usually have a man there.

⑧ Walter had a great need for his biologica family but the only one who seemed to have any bond with him was his brother Karl. When Walter talked to Karl he would be very upset after.

Walter would always be doing well until he talked to Karl. I worried about him talking to Karl because I was afraid Karl was a bad influence on Walter.

⑨ I never had any idea Walter would be violent. He never showed any signs of violence or aggression while we knew him. One time I slapped him & he never got angry or aggressive with me as many boys might. Instead we both hugged & cried.

⑩ We felt sorry for Walter. He never had the love of a mom or dad. Even though we loved him (and love him still) I think it was too late for him when he hadn't had any love before that.

⑪ No one has ever come to talk to me before. If someone had I would have told them this then.

I swear under penalty of perjury according to the laws of the State of Arizona & the United States the foregoing is true to the best of my knowledge.

Patsy Shields 3/2/99

Patsy Shields 3.2.99

[illegible] Shields witness.

Annex MG 57

AFFIDAVIT OF ADA I. BERRIOS

Declaration of Ada I. Berrios

I, Ada I. Berrios under penalty of perjury declare that the following information is true as follow:

1. That I am a paralegal specialist employed by the Federal Public Defender's Office, Capital Habeas Unit.

2. I received a call early Sunday morning of February 28, 1999 from Kelley Henry, one of the senior attorneys in our capital habeas unit to informed me that our office had just been appointed to represent Mr. Walter LaGrand in his Capital Habeas proceeding.

3. I was advised that Mr. Walter LaGrand had a scheduled execution date for March 3, 1999 and due to the time restraint we needed to proceed as soon as possible. Each working staff member at the unit was assigned specific tasks. My duty was mainly to obtain all background information on Mr. Walter LaGrand.

4. The following is a list of the places I have contacted thus far and the result of my search:

Request Date	Place Requested	Result
3/1/99	VisionQuest Lodgemakers - Tucson, AZ Youth Placement Facility	rec'd via fax: 16 pgs of accessment /evaluation reports from various social workers, youth counselor, and Drs.
3/1/99	Arizona Boys Ranch - Queen Creek, AZ Youth Placement and Treatment Facility	rec'd via messenger: appx 75pgs. accessment/evaluation progress report/ medical summary, treatment, education and family data.
3/2/99	Catalina High School [1976-1977]	rec'd. via fax: 2 pg transcript of records with forwarding information re: Bisbee H.S. Dept. Corr. Adobe Ranch. [2.2. Cum. Adverage]

Request Date	Place Requested	Result
3/2/99	Bisbee High School [1977 -1978]	rec'd via fax: 7 pg Transcript attached summary statement of behavior and academic skills. [2.2. cum.]
3/2/99	Pima County Juvenile Court -	Letter - via fax: 3/2/99 from James Orr, supervisor - Pima County Superior Court - "no records found"
3/2/99	Cochise County Juvenile Court -	Letter - via Fax. 3/2/99 from Patricia Durazo, Court Service Division Manager - "Records was formally destroyed by Court Order on 9/24/97.

5. I have also contacted several social workers who worked closely with Walter LaGrand and am presently waiting to obtain signed declarations from them as to their personal observations and recollection of Walter during his stay at Vision Quest. Two of these counselors are now living out of state. I have left messages for all of them, three of which have responded to my call, they appear to be very cooperative and are willing to assist in providing any assistance or information on behalf of Walter LaGrand.

6. It was my impression that one at least one of these counselors appeared upset that he had not been contacted sooner and suggested I contacted his partner who worked along with him and would be in a better position to provide more information, unfortunately, he would be out of town all week.

7. In addition, in reviewing the records I received from Arizona Boys Ranch, there are at least three other schools, medical facilities and staff personnel we need to contacted to obtain full and accurate background information on Walter LaGrand. Therefore, my research is incomplete and my attempt to locate records is still ongoing.

I declare under penalty of perjury that the foregoing is true.

Dated: 2nd day of March, 1999.

Ada I. Berrios

Annex MG 58

MICHAEL K. ADDO,
INTERIM MEASURES OF PROTECTION FOR RIGHTS UNDER THE VIENNA CONVENTION ON CONSULAR RELATIONS
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Interim Measures of Protection for Rights under the Vienna Convention on Consular Relations

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Abstract

The majority of requests for the International Court of Justice to make interim orders of protection were registered between 1990 and 1999. Despite the increasing resort to this remedy, the full legal significance of ICJ interim measures remains a matter of continuing debate. The recent requests for and responses to ICJ interim measures to protect rights under the Vienna Convention on Consular Relations (Breard and LaGrand cases) have rekindled the debate as to the binding nature of such orders. Through a review of these recent cases, this article argues that the text of Article 41 of the Statute of the ICJ alone, under which interim orders are made, is an insufficient guide to the legal effect of the orders made thereunder. Despite the imprecision of the language of Article 41, there is sufficient evidence based on the principles of interpretation to lend weight to binding nature of ICJ provisional measures. It is clear from the review of the ceases that the direct impact of provisional measures on the protection of human rights makes this conclusion a compelling one. The article also reviews the consequences of the United States response ICJ orders.

1. Introduction

The last time the International Court of Justice (IC) was called upon to adjudicate on questions relating to diplomatic and consular relations was in the *Iranian Hostages* case[1] in 1980. The United States, as the applicant in that case, requested and was granted a declaration by the Court to the effect that, by its conduct, the Islamic Republic of Iran had violated its obligations under *inter alia*, the Vienna Convention on Diplomatic Relations (1961)[2] and the Vienna Convention on Consular Relations

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[1] United States Diplomatic and Consular Staff in Tehran (*USA v. Iran*) ICJ Reports, 1980, 3. For the decision on provisional measures, see, ICJ Reports, 1979, 7

[2] Done on 24 April 1961 500 U.N.T.S. 95.

(1963).[3] Eighteen years on (1998/1999), the tables have been turned and the United States stands accused before the same court of two instances of violations of the Vienna Convention on Consular Relations.[4] However, the interest in these cases exceeds the simple fact that the United States is accused of breaches of international law; they also raise important questions of treaty interpretation, the place of international law in a domestic forum (especially, in this context, a federal jurisdiction), the legal significance of interim measures and, the consequences of the pervasive impact of international human rights standards. Most of these questions are expected to be addressed at the merits stage of the *LaGrand*[5] case but, already, the activities at the preliminary stages of both cases raise important international law issues. This article assesses some of the issues raised by the litigation before the domestic and international tribunals.

2. Litigation before the International Court of Justice

In April 1998 and March 1999, Paraguay and Germany respectively filed applications before the Court against the United States of America (USA)[6] alleging violations of Articles 5[7] and 36[8] of the Vienna Convention on Consular Relations.[9]

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[3] Done on 24 April 1963 596 U.N.T.S. 262.

[4] The first case, The Case Concerning the Vienna Convention on Consular Relations (*Paraguay v. USA*) has been discontinued at the request of Paraguay.(ICJ, *Press Communiqué 98/36* of 11 November 1998). The Second case, LaGrand (*Germany v. USA*), is still pending before the Court. See, for details, www.icj-cij.org.

[5] *Ibid.*

[6] *Ibid.*.

[7] Article 5 of the Vienna Convention on Consular Relations (1963) *loc. cit.* provides *inter alia* that:
'Consular functions consist in:

(a) protecting in the receiving State the interests of the sending State and of its national, both individuals and bodies corporate, within the limits permitted by international law;

(i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests.'

Both applicants maintained that nationals of their respective countries (Angel Francisco Breard in the case of Paraguayan and Karl and Walter LaGrand in the German case), who had been convicted of serious criminal offences in the United States were not informed, as required by Article 36 (1) b of the Vienna Convention, of their right to contact consular officials in the United States. Further, consular officials had not been notified of the arrests and detention. In both cases, the accused were, at the time of the applications, facing the death penalty and all domestic remedies had been exhausted. Paraguay and Germany both asked the Court to adjudge and declare *inter alia* that:

1. the United States is obliged not to rely on its domestic law, especially the doctrine of 'procedural default' to preclude the exercise of rights under the Vienna Convention on Consular Relations;
2. the criminal liability imposed on the accused in violation of international law should be recognised by United States authorities as void;
3. the United States restore the *status quo ante* that is re-establish the situation which existed before the breach of the Vienna Convention on Consular Relations.[10]
4. the United States provide guarantees of the non-repetition of the illegal acts;
5. Applicants are entitled to reparation for the illegal acts.[11]

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[8] Article 36 (1)(b) of the Vienna Convention on Consular Relations (1963) provides that:
'1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.'

[9] Done on 24 April 1963 596 U.N.T.S. 262.

[10] In the German application, this claim was restricted to Walter LaGrand because Karl LaGrand had already been executed.

[11] Paraguay claimed *restitutio in integrum* while Germany focused on compensation for the execution of Karl LaGrand on 24 February 1999.

The jurisdiction of the Court was, according to the applicants, founded on Article 36(1) of the Statute of the Court[12] and on Article 1 of the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes.[13] As the United States had all but conceded the breaches of the Convention, the above issues may be encapsulated under the broad heading of the consequences of such a breach. As the Convention itself does not identify any particular consequences, the conclusions of the Court in this regard would be of immense academic and practical interest.

3. Provisional Measures

Meanwhile, considering the imminence of the scheduled execution dates at the time of the applications,[14] the Court was also requested to order provisional measures restraining the United States from implementing the death sentences while the cases were under consideration by the Court.[15] Both applications argued the grounds for their requests and the possible consequences of its dismissal in terms similar to the following from the Paraguayan application:

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[12] Article 36(1) of the Statute embodies the so-called compulsory jurisdiction of the Court and it provides that:
'The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and Conventions in force.'

[13] Done at Vienna, 24 April 1963. 596 U.N.T.S. 488 (1963). Article 1 of the Optional Protocol provides that:
'Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being Party to the present Protocol.'

[14] The Paraguayan application was filed on the 3 April 1998 and Angel Breard was scheduled to be executed on the 14 April 1998. Walter LaGrand was scheduled to be executed on 3 March 1999, a day after Germany initiated its litigation against the United States.

[15] See Case Concerning the Vienna Convention on Consular Relations (*Paraguay v. USA)* Request for the Indication of provisional Measures (9 April 1998) hereafter referred to as the *Breard* case (Application for Provisional Measures) and Case Concerning the Vienna Convention on Consular Relations (*Germany v. USA)* Request for the Indication of Provisional Measures (3 March 1999), hereafter referred to as the *LaGrand* case (Application for Provisional Measures). See, for details, www.icj-cij.org.

> 'Under the grave and exceptional circumstances of this case, and given the paramount interest of Paraguay in the life and liberty of its national, provisional measures are urgently needed to protect the life of Paraguay's national and the ability of this Court to order the relief to which Paraguay is entitled: restitution in kind. Without the provisional measures requested, the United States will execute Mr Breard before this Court can consider the merits of Paraguay's claims, and Paraguay will be forever deprived of the opportunity to have the *status quo ante* restored in the event of a judgment in its favour.'[16]

In the case of Paraguay this request was granted a few days later after an oral hearing.[17] The German request for interim measures, on the other hand, was granted by the Court *proprio motu* in accordance with the powers conferred by Article 75(1) of the Courts Rules of Procedure.[18] The order was made without having heard argument from the parties. The Court justified this unprecedented action on account of the urgency of the situation.[19]

The United States unsuccessfully contested both applications for provisional measures, with an opportunity to set out its arguments during the oral hearings of the *Breard* case. Considering the similarity of issues in the two cases, it is conceivable that arguments similar to those presented in the *Breard* case would have been relied upon in the *LaGrand* case had there been an opportunity to do so. At the oral hearings to consider the application for provisional measures in the *Breard* case, the United States relied on three broad arguments, relating to the jurisdiction of the Court, equality of arms and public policy.

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[16] *Ibid.*, para. 8

[17] The Court decided that:
'The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all measures which it has taken in implementation of this Order.' *Ibid.*, para. 41.

[18] Article 75(1) of the Rules of Procedure provide that:
'1. The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties.'

[19] See, *LaGrand* case, *supra*, note 15 para. 12. The proposal not to hear argument was originally made by Germany.

A. Jurisdiction

In contesting Paraguay's application for provisional measures, the United States argued that the Court had no jurisdiction to hear the case. This was based on two separate but related contentions. Firstly, the Court had no jurisdiction to hear the case because there was no dispute between the parties as to the interpretation or application of the Vienna Convention on Consular Relations. As far as the United States was concerned, both parties were *ad idem* that Article 36 of the Convention conferred the rights of notification identified in the Paraguayan application. Furthermore, the United States had conceded the omission to notify Mr Breard of his rights, and the Paraguayan consul of Mr Breard's arrest and detention. In recognition of the error of her ways the United States had already apologised to Paraguay for the omission and had also undertaken to ensure that the omissions do not occur in the future.[20] In the same vein, Paraguay's objections to the criminal proceedings against Mr Breard do not constitute a dispute concerning the interpretation of the Convention

The second string to the jurisdiction argument was that, as it appears that Paraguay's arguments will not enable her to be successful on the merits of the case, provisional measures should not be ordered.[21] In support of this contention the United States reasoned that although the accused was not informed of his rights under the Vienna Convention, he had received all the necessary legal assistance, had understood the nature of the criminal proceedings and had also admitted his guilt. Therefore, consular assistance would not have made much difference to the outcome. In addition, Paraguay had no legally cognisable claim to the relief sought in her application. There was no entitlement to *restitutio in integrum* under the terms of the Vienna Convention on Consular Relations[22] and, further, the invalidation of criminal conviction for which Paraguay stood in her application has no foundation in the text or *travaux preparatoires* of the Vienna Convention on Consular Relations nor in State practice. The State practice in matters of Article 36(1) notifications is uneven and failures to notify are often remedied by apology. In any case, according to the United States, such a penalty would be unworkable in practice.[23]

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[20] *Bread* case, *supra,* note 15, para. 28

[21] See, generally, *ibid.* para. 20

Since the *Fisheries Jurisdiction* cases, the Court has consistently held that it is not necessary for it to conclusively satisfy itself that it has jurisdiction on the merits of a case in order to be able to indicate provisional measures, although, it ought not make indications for provisional measures if the absence of jurisdiction was manifest.[24] This view has been restated in a long line of cases.[25] In the *Nuclear Tests* case[26] for example the Court found that:

> 'Whereas on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, and yet ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded.'[27]

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[22] *Ibid.* para. 28.
[23] *ibid.* paras. 18 and 20
[24] *UK v. Iceland*, and *Germany v. Iceland*, Interim Protection Order, ICJ Reports, 1972, 12 and 30, para. 16
[25] See, for example, Aegean Sea Continental Shelf case (*Greece v. Turkey*) ICJ Reports, 1976, 3 and the Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. U.S.A*), ICJ Reports, 1984, 169
[26] *Australia v. France*, Interim Protection Order, 1973, ICJ Reports, 99
[27] *Ibid.*, para. 13

On account of this established practice, the Court's reaction to the United States arguments relating to its jurisdiction, especially the second strand, was fairly predictable. The prima facie standard was reiterated by the Court in *Breard* decision,[28] adding that 'the existence of the relief sought by Paraguay under the Convention can only be determined at the stage of the merits; and … the issue of whether any such remedy is dependent upon evidence of prejudice to the accused in his trial and sentence can equally only be decided upon at the merits.'[29] The Court was similarly unpersuaded by the suggestion that there was no dispute between the parties. In the opinion of the Court, 'there exists a dispute as to whether the relief sought by Paraguay is a remedy available under the Vienna Convention, in particular in relation to Articles 5 and 36 thereof.'[30] As there was a dispute relating to the consequences of breach of the Vienna Convention, the Court had little difficulty in founding jurisdiction under Article 1 of the Optional Protocol Concerning the Compulsory Settlement of disputes.[31]

B. Equality of Arms

The United States argued further that provisional measures must take account of the rights of both parties in order to maintain a fair balance. This would not be the situation if the Paraguayan request were granted.[32] The principle of equality of arms is an inherent part of the right to a fair hearing in any litigation,[33] including incidental proceedings before the ICJ. The Court therefore has to be mindful of the impact of its provisional orders on the equality of arms principle. It is indeed arguable that by seeking to preserve the rights of litigants, provisional measures aim to ensure the equality of arms in litigation before the Court. It follows that not all claims to preserve rights will necessarily conform to the need to maintain equality of arms. The nature and context of Court's interpretation of its powers to indicate provisional measures ensures that parties maintain a balance in their standing. In the first place the rights in need of preservation must refer to rights which are the subject of dispute in the judicial proceedings and, perhaps more importantly, that they are at risk of irreparable prejudice.[34] In addition, provisional measures are justified only if there is urgency[35] about the threat to the potential prejudice to the rights in question. In the *Breard* case, and by extension of the argument, the *LaGrand* case, the scheduled execution of the accused would render it impossible for the Court to order the relief sought by Paraguay or Germany. It was the uncontestable urgency in the *Breard* and *LaGrand* cases which led Judges Schwebel and Oda to vote with the rest of the Court despite their strong reservations about the final decisions.

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[28] *Bread* case, *supra*, note 15 at para. 23 where the Court concluded that:
'on a request for the indication of provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, but … it may not indicate them unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded.'

[29] *Ibid.*, para. 33

[30] *Ibid.*, para. 31

[31] *Ibid.*, paras. 31 and 34

[32] *Ibid.*, para. 21

[33] See Article 6 of the European Convention on Human Rights (Rome 1950). For a review of the place of the principle of equality of arms under the Convention, see, Harris *et al*, *Law of the European*

The question of equality of arms was also at the centre of the decision of the Court to order provisional measures without hearing argument from the parties in the *LaGrand* case. Although the Court claimed to have granted the order *proprio motu*, it did so at the instigation of the Applicant in the case. Not to have heard the Respondent's view in the case raises obvious issues of equality of arms in the litigation. This was an issue which caused Judge Schwebel sufficient concern for him

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Convention on Human Rights (Butterworths 1995) 207 *et seq*. See also, Gomien *et al*, *Law and Practice of the ECHR and the European Social Charter* (council of Europe 1996) 172 *et seq*.

[34] In the *Aegean Sea Continental Shelf* case, *supra*, note 25, the Court rejected the Greek application for provisional measures because the Court reasoned that the harm alleged in the Greek application was one that may be capable of reparation by appropriate means.

to question if the Court's approach was 'consistent with the fundamental rules of the procedural equality of the parties.'[36] Schwebel argued fairly strongly on the distinction between Article 74 of the Court's Rules of Procedure[37] which should govern situations in which a party makes an application before the Court on the one hand, and Article 75(1)[38] by which the Court is empowered to indicate provisional measures under its own steam. According to Schwebel,

> 'The Rule (Article 75(1)) assumes that the Court may act on its own motion where a party has not made a request for the indication of provisional measures. But the Court's consideration of the matter in this case has only been provoked by Germany's application and its request for provisional measures. Article 74 of the Rules provides that, when a party makes such a request, the Court shall arrange "a hearing which will afford the parties an opportunity of being represented at it". No such hearings have been held, arranged or contemplated in the current case.'

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[35] See the application by Switzerland in the Interhandel case (*Switzerland v. USA*) ICJ Reports, 1957, 105, was dismissed on account of a lack of urgency

[36] Separate Opinion of President Schwebel in the *LaGrand* case, *supra*, note 15.

[37] The relevant provision in the Rules of Procedure is Article 74(3) which provides that:
'3. The Court, or the President if the Court is not sitting, shall fix a date for a hearing which will afford the parties an opportunity of being represented at it. The Court shall receive and take into account any observations that may be presented to it before the closure of the oral proceedings.

[38] See, *supra*, note 18

Despite his reservations he nevertheless voted for the order and hoped that the Court's action will not form a precedent. In the circumstances, his decision to support the order rather than vote against it, is correct. The distinction sought to be drawn between Articles 74 and 75 of the Rules of Procedures is, on reflection, not a particularly secure one and may only be justified by reading Article 75(1) in isolation and thus out of context. The Court has power to indicate provisional measures *proprio motu* even when a party has made an application and this is confirmed in Article 75(2) which provides that:

> '2. When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request.'

Schwebel's concern for equality of arms is however totally valid because it does not appear on reading the Rules of the Court that a hearing should be dispensed with without overwhelming and compelling reasons.

Confronted with the imminent execution of Mr LaGrand, the Court chose to follow what seemed to it to be the most effective way of securing the life of Mr LaGrand and the rights of Germany. This decision was influenced largely by the extreme urgency of the matter, contributed to by the absence of credible evidence that the United States authorities would show goodwill by staying the execution while the matter was argued before the Court. The distrust of the United States authorities seemed to be confirmed by the fact that despite the indication of provisional orders requesting the United States 'to take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings', the execution nevertheless went ahead as scheduled. Mr Breard was similarly executed inspite of a similarly worded order from the Court. The decision by the United States authorities after both the *Bread* and *LaGrand* cases to execute the accused in the face of the Court's orders rekindles the debate as to whether provisional measures are legally binding, and if so whether the US authorities had complied with the Court's order. An interesting matter discussed in the next section.

C. Public Policy

Finally, the United States made what is, in essence, a general public policy argument to the effect that provisional measures in circumstances of the present case would be contrary to the interests of States Parties to the Vienna Convention on Consular Relations and the international community as a whole. According to the United States, the order sought by Paraguay would disrupt criminal justice systems, given the risk of proliferation of cases.[39] This is not an argument to which the Court addressed directly but perhaps there was little need to do so. If States Parties such as Paraguay and Germany agreed with the United States argument, they would not seek provisional measures from the Court. The present litigation is an indication either that they would not consider that such measures would disrupt their criminal justice systems, or, that any such disruptions, would, in the circumstances, be legitimate. The Court was however keen to point out that the issues in this case do not concern the entitlement of the United States to resort to the death penalty for serious crimes, and also that it is not its function to act as an international court of criminal appeal.[40]

The decisions to indicate provisional measures in the context of the *Breard* and *LaGrand* cases have brought the Court into the direct frame of individual rights protection. In the evolutionary development of its powers this is not surprising as in the past, it has not shunned human rights concerns.[41] The protection of individual rights was at the heart of the Court's provisional orders in both the *Iranian Hostages*[42] and the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*[43] cases. The difference between the present cases and the previous ones is the Court's focus on the rights of the individual. This development was noticeable enough to lead Judge Oda in his separate opinion to caution against its recurrence. According to Judge Oda:

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[39] *Bread* case, *supra*, note 15, para. 22

[40] *Ibid.*, para. 38.

> 'If the Court intervenes *directly* in the fate of an individual, this would mean some departure from the function of the principal judicial organ of the United Nations, which is essentially a tribunal set up to settle inter-state disputes concerning the rights and duties of States. I fervently hope that this case will not set a precedent in the history of the Court.'[44]

Judge Oda is clearly swimming against the tide because the *LaGrand* and *Breard* cases are a predictable, and in the circumstances, justifiable development from the *Hostages* case and the *Bosnia Genocide* case. In addition, on occasions, such as in the present cases where the rights of States and those of individuals are inseparable, it would be unwise for the Court to remain inflexible by seeking to address only the rights of States. This would prove unworkable in practice. International human rights law is understandably a pervasive phenomenon. It provides the essential link in international law between the State and the individual, the ultimate bottom line in any legal order. The effective protection of individual rights before the ICJ cannot be based on the traditional principles of diplomatic protection alone. Diplomatic protection has to take account of the developments in international human rights law.

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[41] For a discussion of this issue, see, Higgins, 'Interim Measures for the protection of Human Rights', in Charney *et al*, (eds.), *Politics, Values and Functions. International Law in the 21st Century. Essays in Honor of Professor Louis Henkin* (Martinus Nijhoff) 87.

[42] *U.S Diplomatic and Consular Staff in Tehran* case *supra*, note 1

[43] *Bosnia & Herzgovina v. Yugoslavia &Montenegro*, ICJ Reports, 1993, 3 and 325

[44] Separate opnion of Judge Oda in the *LaGrand* case, *supra*, note 15

There is also the policy question of the credibility of interim measures, an issue that has brought into sharp focus by the events surrounding this case. The artificial separation between incidental proceedings and the merits stages has often led the Court to postpone the consideration of perfectly valid substantive arguments until the later stage. Respondents in litigation for provisional measures, such as the United States in the cases under discussion, often consider interim measures emerging from incidental proceedings as not sufficiently in conformity with due process rules. This may well account for the abysmal record of compliance with such measures.[45] In the ten cases in which provisional measures were ordered[46] it is only in two of them[47] that one may confidently say that they have been complied with fully. The others (including the two involving the Vienna Convention on Consular Relations)[48] have had either an indifferent or a less compliant response. This profile of State practice creates an unacceptable credibility gap that needs to be bridged. Considering the urgency of provisional measures in order to avoid irreparable prejudice to the rights of litigants, perhaps the best way forward in this regard would be to speed up proceedings in which provisional measures have been ordered. The gap that currently exists between incidental proceedings and the merits stage is sufficiently excessive to generate a sense of injustice in the minds of some litigants.

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[45] On this point see, Shigeru Oda, 'Provisional Measures. The Practice of the International Court of Justice', in Lowe and Fitzmaurice, *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (Grotius) 1996) 541

[46] The ten cases are:
(a). Anglo-Iranian Oil Case (*UK v. Iran*) ICJ Reports, 1951, 89; (b). *Fisheries Jurisdiction* Cases, *supra*, note 24; (c). *Nuclear Tests* Cases, *supra*, note 26; (d). *U.S. Diplomatic and Consular Staff in Tehran* Case, *supra*, note 1; (e). Frontier Dispute (*Burkina Faso v. Mali*) ICJ Reports, 1986, 3; (f). *Military and Paramilitary Activities in and Against Nicaragua* case, *supra*, note 25; (g). *Bosnia Genocide* case, *supra*, note 43; (h). Land and Maritime Boundary Between Cameroon and Nigeria (*Cameroon v. Nigeria*) ICJ Reports, 1996, 13; (i). *Breard* case, *supra*, note 15 and (j). *LaGrand* case, *supra*, note 15.

[47] *Frontier Dispute* case, *ibid.*, and *Land and Maritime Boundary Between Cameroon and Nigeria* case, *ibid.*

[48] On this point see analysis *infra* below.

4. The Response to the ICJ Orders within the United States

In response to the Court's provisional measures order in the *Breard* case, the United States Secretary of State, Madeleine Albright wrote to the Governor of Virginia requesting that he exercise his powers as Governor to stay the execution of Mr Breard.[49] She added, however, that 'it is only with great reluctance that I make this request, especially given the aggravated character of the crime for which Mr Breard has been convicted and sentenced and our view of the merits of the Paraguay's legal claims. As Secretary of State, however, I have a responsibility to bear in mind the safety of Americans overseas.'[50] A habeas corpus application and a petition for certiorari before the United States Supreme Court for the release of Mr Breard was denied the day after the ICJ's provisional measures order. The Supreme Court concluded that Mr Breard had 'procedurally defaulted his claim, if any, under the Vienna Convention [on Consular Relations] by failing to raise that claim in the state courts.'[51] The Supreme Court was similarly unconvinced about the material consequences on the case of the failure to comply with the terms of the Vienna Convention. According to the majority opinion:

> 'Even were Breard's Vienna Convention claim properly raised and proven, it is extremely doubtful that the violation should result in the overturning of the final judgment of conviction without some showing that the violation had an effect on the trial. … Breard decided not to

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[49] Letter of Madeleine K. Albright, U.S. Secretary of State, to James Gilmore III, Governor of Virginia, (April 13 1998).
[50] *Ibid.*
[51] *Breard v. Greene*, 118 S.Ct. 1352, 1354 (1998).

> plead guilty and to testify at his own trial contrary to the advice of his attorneys, who were likely far better able to explain the United States legal system to him than any consular official would have been.'[52]

Of central importance to the present discussion is the fact that the State Department and the Department of Justice filed an amicus curiae brief before the Supreme Court urging the court to decline the habeas corpus and certiorari petitions. The amicus brief drew the attention of the court to the ICJ provisional measures but argued at length that despite the lack of consensus on the matter they should be seen as not binding. Both Breard and LaGrand were executed on schedule.

Was the United States legally bound to comply with the orders of the Court to 'take all measures to ensure that [the accused][53] [are] not executed pending the final decision in these proceedings'?[54] What are the legal consequences of the United States reaction in response to the order? These are two of the interesting questions posed by the preliminary litigation before the International Court of Justice relating to the Vienna Convention on Consular Relations.

A. Binding or Bound to be Ineffective?

The legal effect of orders indicating provisional measures is a subject upon which the Court has not had an opportunity to make a definitive pronouncement although that is one area about which there is vast but differing academic opinion.[55] It is generally argued that the reference in Article 41 of the Court's Statute defining the ICJ's 'power to *indicate*, if it considers the circumstances so require, any provisional measures which *ought to be taken* to preserve the respective rights of either party'[56] is a strong pointer to the non-binding nature of these measures. In her amicus brief to the Supreme Court, the United States argued that: 'the use of precatory language ("indicate," "ought to be taken," "suggested") instead of stronger language (e.g.: the ICJ may "order" provisional measures that "shall" be taken) strongly supports a conclusion that the ICJ provisional measures are not binding.'[57] On reflection, the arguments based on the language of Article 41 of the Statute of the ICJ are rather unconvincing and on deep consideration show a serious misinterpretation of that provision. In the first place, the argument fails to address the simple but crucial question of why a treaty obligation is presented as not binding.[58] Furthermore, in the context of the preliminary litigation when provisional measures are often ordered, the ICJ would not have had an opportunity to be fully appraised of all the circumstances of the case including the most appropriate and precise measures necessary for securing litigants rights. The language of Article 41 of the Statute anticipated this and was therefore drafted to enable the Court to secure the rights of litigants by making broad directions, leaving States with sufficient discretion to select the most appropriate, in terms of effectiveness, means of achieving the aims of the order. Such co-operation between an international tribunal and national government, that is based on good faith and the self-interest, underlies the effectiveness in international law. The power to 'indicate provisional measures' … 'which ought to be taken' reflects the ability of the Court to make 'indications' which are expected to be carried out in the relevant domestic environment by the litigating States.

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[52] *Ibid.*, p.1355.

[53] Angel Francisco Breard in the Paraguay application and Walter LaGrand in the application submitted by Germany.

[54]). *Breard* case, *supra*, note 15 para. 41 and *LaGrand* case, *supra*, note 15, para. 29

[55] See for discussions on this subject, Elkind, *Interim Protection: A Functional Approach*, (Nijhoff) 1983; Collins, 'Provisional and Protective Measures in International Litigation', 234 (1992-III) *Recueil*

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des Cours, 9 and Bernhardt (ed.), *Interim Measures indicated by International Courts*, (Springer-Verlag) 1994. See also, Oda, 'Provisional Measures' *supra*, note 45.

[56] ICJ Statute, June 1945 (emphasis added).

[57] See on this point the amicus brief of the United States to the Supreme Court

A proper interpretation of Article 41 of the Statute, taking account of its context and object and purpose,[59] does not lend sufficient support to the view that provisional measures are not legally binding. As an obligation arising from a treaty, the suggestion that an order made by the ICJ, even at the preliminary litigation stage, is not binding is bizarre in the extreme, especially when Article 41 of the Statute of the ICJ is read in conjuction with Article 94(1) of the Charter of the United Nations.[60] That ICJ provisional measures are legally binding, in terms of requiring States to comply with them is not in doubt. To reason otherwise is to deny the provision of the Statute of effect and this could not have been the intention of the drafters of such an important treaty.

Admittedly, the language of Article 41 of the Statute of the ICJ may be imprecise, but that alone is not sufficient reason to conclude that the provision is not binding, especially if its effectiveness can be justified by applying the well-known treaty law principle of *ut res magis valeat quam pereat*. This principle, often referred to as the principle of effectiveness,[61] is acknowledged to be inherent in Article 31 of

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[58] See Article 26 of the Vienna Convention on the Law of Treaties (Done 22 may 1969) which provides that: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

[59] As recommended by Article 31(1) of the Vienna Convention on the Law of Treaties (1969).

[60] Article 94(1) of the United Nations Charter (1945) provides that: 'Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.'

See also the effect of Article 26 of the Vienna Convention on the Law of Treaties, *supra*, note 58. It is particularly important to distinguish between provisional measures issued by the ICJ under the authority of a treaty and those which are issued under facilitative Rules of Procedure such as under the Rules of Procedure of the European Court of Human Rights or those of the United nations Human Rights Committee. The acknowledged non-binding nature of the orders made under Rules of Procedure (on this, see, van Boven, 'Facing Urgent Human Rights Cases; Legal and Diplomatic Action', in Lawson and de Blois (eds.), *The Dynamics of the Protection of Human Rights in Europe. Essays in Honour of Henry G. Schermers Vol. III* (Nijhoff 1994) 61), does not apply to the ICJ orders which are treaty-based.

[61] For a discussion of the scope of this principle, see, McNair, *Law of Treaties* (Clarendon 1961) 383-385. See also, Elias, *The Modern Law of Treaties*, (Oceana 1974), 73-75 and McDougal *et al*, *The Interpretation of Agreements and World Publis Order*, (Yale University Press 1967), 156 *et seq*. See also, Fitzmaurice, 'The Law and Practice of the ICJ: Treaty Interpretation and Certain Other Treaty Points', 28 (1951) *BYIL*, 18.

the Vienna Convention on the Law of Treaties[62] and has been invoked, often approvingly, in litigation before the ICJ.[63] In general, it postulates that treaty provisions should, where possible, be interpreted so as to make the treaty effective rather than to deprive it of it. In practice, the principle is particularly useful in the interpretation of treaties whose purposes are clear, so that when a tribunal is confronted with competing interpretations of that treaty, it can favour the interpretation which conforms closest to the purposes of the treaty in question. In so far as Article 41 of the Statute of the Court is intended to preserve the rights of litigants before the Court pending its final decision and also to ensure that irreparable damage is not caused to these rights, it is important that this provision is interpreted to have more compelling force. In other words, an interpretation that enables litigants to ignore orders made under Article 41 would surely deprive the provision of its effectiveness and hence unacceptable. A similar approach to interpretation was taken by the Court in its Advisory Opinion in the *Reparations* case.[64] To the question whether the United Nations has the capacity to bring an international claim on behalf of its agents, the Court concluded that as 'the organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. … it could not carry out the intentions of its founders if it was devoid of international personality.'[65] Accordingly, the Court concluded that the United Nations is an international person.

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[62] *supra*, note 58. Article 31 of this Convention provides *inter alia* that: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose.'
During the discussion of the draft of this Convention, the International Law Commission took the view that 'in so far as the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in [draft] article 27, paragraph 1, [i.e. article 31(1) of the final text] which requires that a treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to its terms in the context of the treaty *and in the light of its object and purpose*. When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.'. See, *YBILC*. (1966), II, 219.

[63] See for example, the Corfu Channel case (*UK v. Albania*) ICJ Reports, 1949, 4, at 24; the Ambatielos case (*Greece v. UK*) ICJ Reports, 1952, 24 at 45; the Advisory Opinion in the *Reparations for Injuries Suffered in the Service of the United Nations*, (1949) ICJ Reports, 1949, 174, at 179 and the Advisory Opinion in the *Certain Expenses of the United Nations* case, ICJ Reports, 1962, 151, at 162 *et seq*.

[64] *Reparations* case, *Ibid*.

However, the Court has regularly reiterated the view that where the purpose of the treaty is unclear or non-existent, it is not the role of the tribunal to divine such a purpose under the pretext of seeking to make the treaty effective. To the question posed in the request for an Advisory Opinion in the *Interpretation of Peace Treaties* case[66] as to whether in the event of the parties' failure to nominate a representative to the tribunal envisaged by the treaty, the Secretary-General of the United Nations could nevertheless nominate the 'third member' of the tribunal the Court answered in the negative reasoning *inter alia* that:

> 'The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat,* often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of dispute in the Peace treaties a meaning which … would be contrary to the letter and spirit.'[67]

This caveat is inapplicable in the present interpretation of Article 41 of the Statute of the Court.

It is possible to argue that Article 41 of the ICJ Statute has lost some or all of its binding character as a consequence of continuing disregard with which most respondent States have treated the provisional orders directed at them.[68] However, the State practice on the matter is an indication of the ineffectiveness of provisional measures in practice rather than of their non-binding nature in law.

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[65] *Ibid.*,

[66] (Second Phase) ICJ Reports, 1950, 221.

[67] *Ibid.*, 229

The true legal character of provisional measures may lie somewhere between the two extreme academic characterisations. On a purposive interpretation of Article 41, it is clear that provisional measures are expected to secure vulnerable rights of the parties and will be ordered only after the most rigorous examination of key questions relating to the jurisdiction of the Court, the urgency of the matter and the possibility of irreparable harm.[69] The rigour and care with which the Court reviews requests for provisional measures is an indication of their legal importance and orders emanating from such a context deserve higher legal value than that of a mere recommendation. In fact, there should be little dispute about their binding character. From an objective point of view, it is difficult to contest this as a matter of principle, in which case the focus of the debate should be on the practical consequences of the individual Court order. For example, a broadly drafted Court order may give contesting States wider discretion as to the manner of compliance. In such an event, less comprehensive measures short of total disobedience to the Court order can be considered to be legitimate within the scope of the letter of the order if not always in the spirit of it. Conversely, an order with more precise indications provides relatively limited scope for States' manoeuvre in their compliance of the order. Unlike the broadly drafted provisional orders, it is much easier in cases of narrowly drafted orders to tell the extent of non-compliance. The broad manner of the orders in the *Breard* and *LaGrand* cases 'to take all measures to ensure that [the accused are] not executed, contrast sharply with, for example, the Court's order in the *Iranian Hostages* case for

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[68] On this point see, Oda, 'Provisional Measures', *supra*, note 45. See also notes 46-48 *supra*, and accompanying texts.

[69] *Nuclear Tests* Cases, *supra*, note 26, 103 *U.S. Diplomatic and Consular Staff in Tehran* Case, *supra*, note 1, para. 36 and, *Bosnia Genocide* case, *supra*, note 43, para. 34.

Iran to immediately ensure the restoration of the premises of the US Embassy to the possession of the US authorities as well as the immediate release of the hostages.[70]

In the cases relating to the Vienna Convention on Consular Relations,[71] the United States was extremely careful not to suggest that all provisional measures were not binding but rather limited her views and practical response to the specific terms of the Court's orders. Although in their amicus curiae opinion to the US Supreme Court, the State Department and Department of Justice expressed a preference for the academic opinion holding ICJ provisional measures not to be binding, this was in a wider context acknowledging a clear lack of academic consensus on the matter.[72] Not only is this preference for a particular line of academic argument inconclusive of the issue of legal effect of provisional measures, but also, it is a position which reserves room for persuasion to an alternative view at a later stage of the academic discourse. Therefore, the most significant contribution of the amicus curiae opinion is the conclusion that the provisional measures directed at the United States are rather broad, leaving the United States to take whatever measures it considers appropriate in the circumstances. According to the amicus brief,

> 'the "measures at [the Government's] disposal" are a matter of domestic United States law, … The "measures at [the United States'] disposal" under our constitution may in some cases include persuasion – such as the Secretary of State's request to the Governor of Virginia to stay Breard's execution – and not legal compulsion through the judicial system.'

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[70] Other precise order were in the *Nuclear Test* cases when France was ordered to avoid (atmospheric) nuclear tests causing the deposit of radioactive fall-out on Australian and New Zealand territories. See also the order in the *Nicaragua* case in which the United States was called upon to cease and refrain from any action blocking access to or from Nicaraguan ports and laying or mines.

[71] *Breard* case, *supra*, note 15 and . *LaGrand* case, *supra*, note 15.

[72] *Bread v. Greene*, 118 S.Ct. 1352 (1998) Brief of the United States as Amicus Curiae.

Similarly, in her letter to the Governor of Virginia, the Secretary of State, Madeleine Albright focused on the 'non-binding language' of the specific order under consideration rather than to suggest that provisional measures were not legally binding as a matter of international law.[73] This phrase 'non-binding language' used by the Secretary of State must not be interpreted to suggest that the order was not legally binding per se but rather a reflection of its broad character, leaving room for the United States to take the necessary action to comply with it. Indeed, the Secretary of State's letter to the Governor of Virginia in response to the ICJ order is itself evidence that she considered the order to be legally binding.

B. Compliant or Disregarding

The issue of whether the provisional orders from the ICJ are binding is directly related to the extent of United States compliance with the orders. In truth, although the United States response to the ICJ orders may be said to be in compliance of the letter of the orders, the limited action by the Secretary of State and the contradictory arguments filed by her office in conjunction with the Department of Justice in the amicus curiae opinion before the Supreme Court unfortunately undermined the spirit of the ICJ orders. There is an overwhelming impression that the United States did not take the ICJ orders seriously and therefore lost an opportunity to indicate good practice for instilling effectiveness into such orders. In the circumstances, the United States betrayed the confidence normally reposed in States to flesh out skeletal orders of international tribunals. It may also be the fact that the ICJ's inability to prescribe more precise indications in such circumstances is a structural shortcoming in international dispute settlement that may need to be remedied.

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[73] Letter of Madeleine K. Albright, U.S. Secretary of State, to James Gilmore III, Governor of Virginia, *supra*, note 49. She wrote that 'The International Court, however, was not prepared to decide the issues we raised in its urgent proceedings last week. Using non-binding language, the Court said that

In the light of the ICJ order directed the United States to 'take all measures at its disposal to ensure that [the accused are] not executed pending the final decision in these proceedings', could or indeed should the United States have done more than it chose to do? Emphasising the need to take 'all measures at its disposal', it is arguable for example that the Secretary of State could have been less diffident and more compelling in her letter to the Governor of Virginia demanding rather than urging the postponement of Mr Breard's execution. A more decisive approach from the Secretary of State and the State Department may have helped focus the minds of other United States institutions in ensuring that the ICJ orders are implemented in full. The State Department need not have joined the Department of Justice in its amicus curiae opinion in which it played down the legal significance of the ICJ order. One would normally have expected nothing less than the contrary arguments in which the attention of the Supreme Court is drawn to the compelling obligations inherent in the ICJ orders or persuaded to show deference for the views of the ICJ as a matter of judicial comity.[74] In fact, the Supreme Court could have taken a more serious account of the legal obligations generated by the ICJ orders or where this is not possible, 'invite the executive branch to invoke judicial assistance by other proceedings.'[75] With its recognised leadership in the field of international affairs, the State Department could have argued the legal significance of ICJ measures arising from United States treaty obligations which by the terms of the Constitution of that country

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the United States should "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings.'

[74] On this point, see, Slaughter, 'Court to Court', 92 (1998) *AJIL*, 708.

[75] See, Henkin, 'Provisional Measures, U.S. Treaty Obligations and the States' 92 (1998) *AJIL*, 679. He cites the cases of *Sanitary Dist. V. United States*, 262 U.S. 405 (1925) and *United States v. Minnesota*, 270 U.S. 181 (1926) to support this claim.

are part of the law of the land.[76] As applicable law of the United States the ICJ orders defined obligations 'for all who exercised authority in or on behalf of, the United States.'[77] In this instance, according to Professor Louis Henkin,

> 'Secretary [of State] Albright heard the voice of the International Court and acted upon it. But the Solicitor General seemed to be under the impression that the order of the Court was not addressed to him (or at least he was not bound by it). The Supreme Court was also perhaps under the impression that the ICJ order was not addressed to it, that it was not bound by it, or that it had no responsibility (and no means) to honor it. The Department of Justice did not take measures to obtain compliance by the State of Virginia with the treaty obligation of the United States to stay the execution. Governor Gilmore seemed to be under the impression that the International Court of Justice was not addressing him; perhaps he did not think he was required to honor Secretary Albright's request.'[78]

The United States response to the ICJ orders was haphazard and often contradictory. The relevant institutions did not work together towards a single purpose and to all intents and purposes clearly failed to implement the orders effectively. This is particularly unfortunate in view of the fact that a genuine lack of co-operation by other official institutions and departments could have been overcome by an executive order from the President compelling compliance with United States treaty obligations.[79]

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[76] See Article VI of United States Constitution. On this point see, Henkin, 'Provisional Measures', *Ibid.*, and Vazquez, '*Breard* and the Federal Power to require Compliance with ICJ Orders of Provisional Measures', 92 (1998) *AJIL*, 683.

[77] Henkin, 'Provisional Measures', *ibid*, at 680.

[78] *Ibid.*

[79] Vazquez, '*Breard* and the Federal Power to require Compliance', *supra*, note 76, at 685.

In the United States, effective implementation of ICJ orders depends on the leadership provided by the federal government and especially the State Department. Where this leadership is weak and uncertain the process of implementation fails too.[80] The Secretary of State took *a* measure as required by the ICJ order by writing to the Governor of Virginia but the terms of the letter lacked commitment. She found no further reason to explore alternative measures and in fact, did not object to the endorsement given by her officials to a damaging amicus brief prepared by the Department of Justice. The irresolute approach taken by the Secretary of State and her officials was extremely influential in the reaction of other United States institutions and officials. Judges of the Supreme Court, no doubt as independent as they are known to be, could not have lost sight of the significance of the official State Department position in this matter in their conclusions. In the same vein, the Governors of the Virginia and Arizona where Mr Breard and LaGrand faced the death penalty respectively were strengthened in their determination not to exercise clemency.

The United States set a particularly bad precedent for the future of international rule of law. The United States treatment of the provisional orders reflects a failure of leadership on its part. If other States are encouraged to follow the United States example by being selective and sceptical about ICJ orders, the authority of the Court will surely be undermined. The ICJ may well have to reconsider the confidence and good faith it has reposed in States to treat its orders with respect. This lack of trust may have partly contributed to the unprecedented step taken by the Court to order provisional measures in the *LaGrand* case without argument from the parties. The Court may also decide to restrict State discretion in the implementation of provisional measures by being a lot more specific and precise in its future orders. Such a development would be unfortunate because the Court risks greater conflict with litigating States in the hope of asserting its authority.

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[80] Weak leadership is, of course, no excuse for non-compliance with international obligations.

A crucial factor in looking at the specific content of ICJ provisional measures for guidance to as to how best to implement them diligently is to pay attention to all relevant qualitative issues. Unfortunately, the United States in its effort to avoid disruption to its domestic legal process failed to realise that despite the broad presentation of the ICJ orders there was a matter of the human right to life at the heart of all the formality of diplomatic discourse and the rigidity of legal argument. By failing to attach importance to this distinguishing characteristic of the cases, the United States ignored not only the stark reality of the irreparability of lost life but also the importance of the right to life in international human rights law.[81] It has been argued that restrictions on and abolition of the death penalty is fast approaching a norm of customary international law,[82] and this fact should have been weighted heavier in favour of adopting further and more effective measures to implement the ICJ orders. In the same vein, the lack of consular access in both the *Breard* and

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[81] Apart from the provisions in international treaties recognising the right to life (see, Article 6 of the International Covenant on Civil and Political Rights (1966); article 4 of the American Convention on Human Rights (1969); article 4 of the African Charter on Human and Peoples' Rights (1981); article 2 of the European Convention on Human Rights (1950), there is an increasing effort to abolish the death penalty (see Protocol No. 6 of the ECHR (1983); the Second Optional protocol to the ICCPR (1989) and the Protocol to the American Convention on Human Rights to Abolish the Death penalty (1990). In practice, it is estimated that by December 1998, 63 States had abolished the death penalty for all crimes, 16 States had done so for all but the most exceptional crimes such as war crimes and another 24 States have been abolitionists *de facto* as they have not carried out any executions for at least 10 years. On this point see, Prokosch, *Human Rights v. Death Penalty. Abolition and Restriction in Law and Practice*, (Amnesty International) 1998. In addition, is noteworthy that the European Court of Human Rights and the Inter-American Court of Human Rights have ruled that certain aspects of the death penalty to be inhuman and degrading (see *Soering v. United Kingdom*, ECHR (1989), Series A, No. 161 and Inter-American Court of Human Rights, Advisory Opinion OC-3/83 of 8 September 1983 on *Restrictions to the Death penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights*. See also Case 9647, *Roach and Pinkerton* in *Annual Report of the Inter-American Commission on Human Rights 1986-1987*, 147.

[82] See Schabas, *The Abolition of the Death penalty in International law* (Grotius 1997), 20.

LaGrand cases which arguably created an unfairness in the criminal procedures[83] should have tilted the scales in favour of the restraint suggested by the ICJ in its provisional measures. The true impact of these human rights issues will become clear at the merits stage but nevertheless their significance at the preliminary stage should have been recognised.[84]

The complementarity between international and national institutions in upholding the international rule of law is well known. In practice, the implementation of measures such as orders made at the preliminary stage of international litigation can involve complex processes of balancing competing claims and interests at both national and international levels.[85] However, it is crucial that the whole process is seen to be transparent, as objective as possible and in any case, effective in upholding the international obligations assumed in good faith. Domestic law and procedures may be taken into account in defining the most effective way of upholding international obligations in practice, but it is trite knowledge that domestic law cannot be an excuse for the non-compliance with international law.[86] In the same context, unjustified preferences for some factors over others or a dependence upon irrelevant considerations may damage the credibility of the process and its conclusions. In the context of how to implement the ICJ measures effectively the United States unfortunately attached greater importance to domestic factors to the detriment of international rule of law. For example, at the stage of the preliminary litigation before the ICJ, the argument that the deceased had had a fair trial or that their cases were unlikely to be prejudiced by the lack of consular access[87] were clearly irrelevant as to whether or not to heed the Court's preliminary orders. In making the preliminary measures orders, the Court was fairly aware of the domestic trials and equally aware of the impact of these and other substantive issues on arguments relating to the merits of the case. The Court's primary concern at that stage of litigation was to secure the rights of the parties by forestalling irreparable harm. Similarly, domestic law arguments relating to procedural default and the so-called exclusive jurisdiction of the United States Supreme Court to postpone the execution or the clemency powers of Governors of states should not have been used to override the value of the Court's orders at the preliminary stage of the litigation.[88]

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[83] The European Court of Human Rights for instance has devoted a considerable attention to the distinction in Article 6 of the ECHR between objective and subjective impartiality. In the present cases, the issue is not one of subjective impartiality but one of objective impartiality under which the question is whether there have been sufficient guarantees to exclude any legitimate doubt in the trial process. On this point see *Hauschildt v Denmark*, ECHR (1989), Series A, No.154.

[84] For a general discussion of this subject see, Higgins, 'Interim Measures for the Protection of Human Rights', *supra*, note 41

[85] See, Bradley and Goldsmith, 'The Abiding Relevance of Federalism to U.S. Foreign Relations', vol. 92 (1998) *AJIL*, 675

[86] See Article 27 of the Vienna Convention on the Law of Treaties which provides that: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty ...' There is also a wealth of respectable case law to support this view. See, for example, the *Alabama Claims* Arbitration (1872), the Wimbledon case (*France, Italy, Japan and the UK v. Germany*) PCIJ Reports, Series A, No. 1 (1923), 29; the Chorzow Factory (Merits) case (*Germany v. Poland*) PCIJ Reports, Series A, No. 17, (1928), 33, 34; the Nottebohm case (*Liechtenstein v. Guatemala*) ICJ Reports, 1955, 4 at 20-21.

5. Conclusions

That the United States was not entirely unequivocal in its suggestion that interim measures are not binding per se is a significant factor in the discourse relating to the legal significance of such measures. On critical reflection of the United States' response to the ICJ orders, there is merit in the inherent argument that a distinction should be drawn between the binding nature of such orders and the steps taken to implement them. This is crucial to our understanding of the subject because States may, depending upon the wording of the individual ICJ order, legitimately take less than comprehensive steps to implement the Court's directions without doubting their binding nature. The discretion which States retain in the implementation of such orders allows them to strike a balance between competing factors at both national and international levels. This is what the United States sought to do in the *Breard* and *LaGrand* cases. Unfortunately, it did so rather poorly by attaching excessive importance to domestic law factors to the detriment of its international obligations. While it is difficult to say that such a misuse of discretion is itself a breach of the terms of the ICJ orders, it most certainly went against the spirit of the orders.

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[87] See *Breard v. Greene, supra*, note 51. A careful examination of the facts of the *Breard* case suggests that this assertion is also unjustified. In an earlier litigation in the United States courts (*Breard v. Netherland*, 949 F.Supp. 1255 (1996), it apparently emerged that 'Breard believed he had committed the crime under a satanic curse from his ex-father-in-law. His conversion and rebirth in Jesus Christ, according to Breard, freed him from the curse. Thus Breard believed that if the jury were told of the satanic curse and his rebirth in Jesus Christ, they would understand that he had not been responsible for his actions at the time of the murder and would set him free. Apparently, in South American jurisprudence, the fact one believes he is under a satanic curse is mitigating evidence in the sentencing phase of a trial and a confession to a jury is likely to result in greater leniency.' See, Kadish, 'Article 36 of the Vienna Convention on Consular Relations: A Search for the Right of Consul', 18 (1997) *Mich.JIL*, 565, at 582. Breard had also turned down plea bargaining offer with the Commonwealth of Virginia to be able to make this confession to the jury. Evidently he was not particularly bright but if ever someone could have benefited from the perception of a consular officer on this matter it was Mr Breard. The cultural implications of his decisions were more likely not appreciated by his American lawyers.

[88] See *supra*, note 86 *supra* and accompanying text.

As a country confronted with widespread deficiencies in its domestic application of the Vienna Convention on Consular Relations,[89] the United States' response to the ICJ order should not come as particularly surprising. The fear of floodgate of litigants seeking to set aside convictions for non-compliance with the Vienna Convention on Consular Relations, counter pressure from victims' families and non-governmental organisation may have weighed heavily on the minds of United States policy makers. There are, also, public order concerns (e.g. the need to deter the growing culture of violent crime) and not forgetting the career ambitions of individual policy makers, especially Governors of States where these offences are committed. Perhaps, the importance of international rule of law, especially, in the present context the importance of international human rights law should have been paramount. Be that as it may, as it is unlikely that the Court will review the United

States use of discretion in this matter, it is important to look to the future of the international law issues raised here. There is a definite structural shortcoming in the manner in which provisional measures are currently conceived. Unless these are remedied, their effectiveness will remain a matter of chance. The procedures for consular access may well get the necessary boost. The benefits of any increased awareness about consular access may however remain variable. However, even if only some detainees were to receive the full benefits of consular access as a result of recent events in the United States, then the litigation and the widespread academic comment can be said to have been worthwhile.

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[89] It is estimated that over 70 other foreign nations remain in detention in the United States who have not been made aware of their right to consular access. See, Shank and Quigley, 'Foreigners on Texas's Death Row and the Right of Access to a Consul', 26 (1995) *St Mary's Law Journal*, 719.

Annex MG 59

STATEMENT BY GOVERNOR JIM GILMORE CONCERNING THE EXECUTION OF ANGEL BREARD (14 APRIL 1998)

COMMONWEALTH OF VIRGINI

OFFICE OF THE GOVERNOR

PRESS OFFICE

Contact:	Mark A. Miner	**FOR IMMEDIATE RELEASE**
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STATEMENT BY GOVERNOR JIM GILMORE CONCERNING THE EXECUTION OF ANGEL BREARD

RICHMOND – Angel Breard, through his attorneys, has petitioned me to grant clemency for his crimes or, alternatively, a reprieve pending the outcome of proceedings commenced by the Republic of Paraguay in the International Court of Justice. The U.S. Secretary of State has also requested that I stay Mr. Breard's execution for an indefinite period. For the following reasons, I must decline to intervene in this matter.

Breard was convicted and sentenced to death for the attempted rape and brutal murder of Ruth Dickie, a 39 year old unmarried woman. Microscopic examination of Breard's hair, together with enzyme and DNA testing of his blood, established Breard's guilt. Additionally, Breard testified in open court, admitting his own guilt. Breard was represented by counsel and received a fair trial. His arguments to overturn his conviction and sentence have been heard and rejected by the Supreme Court of the Commonwealth of Virginia, the U.S. District Court for the Eastern District of Virginia, the U.S. Court of Appeals for the Fourth Circuit, and the U.S. Supreme Court.

It has been stipulated by both the prosecution and Mr. Breard that he was not notified of his ability to contact his consulate as required under the Vienna Convention on Consular Relations. The Republic of Paraguay has brought a proceeding in the International Court of Justice, claiming that that foreign tribunal has jurisdiction to stay his execution, void his conviction, and order a new trial. The International Court of Justice has issued an "indication of provisional measures" to have Mr. Breard's execution delayed while it considers the merits of Paraguay's claims. It is my understanding that the International Court's proceeding could take years to reach conclusion.

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Both Mr. Breard and the Republic of Paraguay filed cases concerning this matter before the U.S. Supreme Court. At the request of the Court, the U.S. Department of Justice has argued forcefully that the rulings of the International Court of Justice are not enforceable by the courts of the United States, that the International Court of Justice has not authority to intervene in the criminal justice system of the Commonwealth of Virginia or any other state, and that the Supreme Court should not intervene in this matter. At the same time, the Secretary of State has requested that I stay Mr. Breard's execution. The Secretary specifically raises concern "about the possible negative consequences for the many U.S. citizens who live and travel abroad."

The concerns expressed by the Secretary of State are due great respect and I have given them serious consideration. However, it is but one of the various concerns that I must take into consideration in reaching my decision.

As Governor of Virginia my first duty is to ensure that those who reside within our borders -- both American citizens and foreign nationals -- may conduct their lives free from the fear of crime. Our criminal justice system is designed to provide the greatest degree of safety for law abiding citizens and foreign visitors alike while ensuring substantial procedural safeguards to those accused of crime. Indeed, in this case Mr. Breard received all of the procedural safeguards that any American citizen would receive.

I am concerned that to delay Mr. Breard's execution so that the International Court of Justice may review this matter would have the practical effect of transferring responsibility from the courts of the Commonwealth and the United States to the International Court. Should the International Court resolve this matter in Paraguay's favor, it would be difficult, having delayed the execution so that the International Court could consider the case, to then carry-out the jury's sentence despite the rulings the International Court.

The U.S. Department of Justice, together with Virginia's Attorney General, make a compelling case that the International Court of Justice has no authority to interfere with our criminal justice system. Indeed, the safety of those residing in the Commonwealth of Virginia is not the responsibility of the International Court of Justice. It is my responsibility and the responsibility of law enforcement and judicial officials throughout the Commonwealth. I cannot cede such responsibility to the International Court of Justice.

Mr. Breard having committed a heinous and depraved murder, his guilt being unquestioned, and the legal issues being resolved against him, and the U.S. Supreme Court having denied the petitions of Breard and Paraguay, I find no reason to interfere with his sentence. Accordingly, I decline to do so.

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Annex MG 60

U.S. DEPARTMENT OF STATE,
FOREIGN AFFAIRS MANUAL 1984
(EXTRACT)

7 FAM 400 ARREST OF U.S. CITIZENS ABROAD

7 FAM 400 (This is under the OLD Numbering Scheme)

7 FAM 401 INTRODUCTION

(TL:CON-11; 10-30-84)

Traditionally, one of the basic functions of a consular officer has been to provide a "cultural bridge" between the host community and the officer's own compatriots traveling or residing abroad. No one needs that cultural bridge more than the individual U.S. citizen who has been arrested in a foreign country or imprisoned in a foreign jail.

Neither arrest nor conviction deprives a U.S. citizen of the right to the consular officer's best efforts in protecting the citizen's legal and human rights. Consular officers are obliged to assist arrested or imprisoned U.S. citizens with dedicated professionalism, regardless of their own views as to the innocence or guilt of the individuals.

Although consular officers are the principal action officers in arrest cases, they may need help from other post officers in making prison visits, in attending trials, and in cultivating rapport with and gaining the cooperation of local law enforcement officials. This is especially true at posts where consular resources are limited and the consular workload is heavy. Such cooperation should be encouraged whenever possible.

The guidelines in this chapter should not be taken as defining the limits of a post's responsibility, but rather as furnishing a frame of reference for each post's own creative approach to arrestee and prisoner services.

7 FAM 402 AUTHORITY

There is limited legislative authority for providing consular assistance to U.S. citizens who are detained, arrested, or imprisoned abroad. Public Law 95-45 of June 15, 1977, effective October 1, 1978, provided for emergency medical and dietary assistance (EMDA) to prisoners abroad on a reimbursable basis (see section 7 FAM 450). The Vienna Consular Convention and many current bilateral consular treaties require that host governments of countries which are signatories to such a convention or treaty notify arrestees promptly of their right to communicate with the U.S. consul and/or notify the consular officer of a foreign state of the arrest of one of its citizens (see sections 7 FAM 411.1 and 7 FAM 411.2).

(TL:CON-11; 10-30-84)

7 FAM 411 NOTIFICATION

In order for the consular officer to perform the protective function in an efficient and timely manner, it is essential that the consul obtain prompt notification whenever a U.S. citizen is arrested. Prompt notification is necessary to assure early access to the arrestee. Early access in turn is essential, among other things, to receive any allegations of abuse, to provide a list of lawyers and a legal system fact sheet to prisoners, to obtain a Privacy Act waiver, and to acquire certain information to enable the post and the Department to respond promptly and accurately to inquiries about the case (see section 7 FAM 412 .)

7 FAM 411.1 Vienna Consular Convention

Article 36 of the Vienna Consular Convention provides that the host government must notify the arrestee without delay of the arrestee's right to communicate with the American consul. Consular officers should be familiar with the Vienna Convention and its provisions on arrest cases. See section 7 FAM 411 Appendix A 411.1 , for an extract from the Vienna Consular Convention and section 7 FAM 411 Appendix A 411.2 , for a current list of signatories to this Convention.

7 FAM 411.2 Bilateral Consular Treaties

Many of our current bilateral consular treaties also require that the arresting authorities directly and promptly notify the consular officer of a foreign state of the arrest of a national of that state. The consular officer must be familiar with the details of bilateral consular treaties between the host government and the United States (see section 7 FAM 411 Appendix A 411.2). The text of applicable bilateral treaties should be inserted into this chapter by consular officers at post for ready reference.

7 FAM 411.3 Relations with Local Authorities

Practical considerations make it imperative that the consular officer be notified immediately by local authorities whenever a U.S. citizen is arrested. For purposes of notification and access, the Department considers a citizen under arrest from the moment the citizen is deprived of liberty by a foreign governmental agency or authority. In order to provide effective protection and assistance to arrested Americans, consular officers are expected to maintain relationships with local authorities and other sources which will secure their cooperation in providing immediate notification, no matter what the language of applicable treaties legally requires. Without such prompt notification of arrest, it is impossible to achieve the essential timely access to a detained U.S. citizen.

7 FAM 412 ACCESS

Experience has demonstrated that prompt personal access to the detained citizen assures both the arrestee and the host authorities of the serious interest of the U.S. Government in the case. Further, it enables the consular officer to provide the arrestee with a list of reputable lawyers or information concerning local legal aid before the arrestee selects a lawyer who may prove to be a charlatan. It provides an opportunity for the consular officer to explain the legal and judicial procedures of the host government and the detainee's rights under that government at a time when such information is most useful. Prompt personal access to the detainee is necessary to forestall physical abuse of the prisoner by the arresting and/or investigating authorities or to ascertain when such abuse has occurred.

If the Department and its posts abroad are to insist that host-country arresting authorities notify an American consular officer without delay following their arrest of a U.S. citizen, it is incumbent upon the consular officer to visit the arrestee as soon as possible following receipt of notification. Otherwise the sincerity and credibility of the U.S. Government about its concern for its arrested citizens' welfare and rights will surely be questioned, and obtaining the cooperation of host country officials on prisoner matters will be more difficult.

Upon receiving notification that a U.S. citizen is being detained, it is absolutely essential that the post achieve timely access to the detainee through one of the following methods.

7 FAM 412.1 Personal Visit

Except under the most extraordinary circumstances, an officer must personally see and visit the arrestee as soon as possible, normally within 48 hours of receipt of notification. Should a personal visit prove impossible and one of the methods described below be employed, the post must explain to the Department the circumstances preventing the personal visit.

7 FAM 412.2 Telephone Contact

If an immediate personal visit by an officer is not possible, efforts must be made to get in touch with the detainee by telephone. Such contact does not eliminate the consular officer's responsibility to follow up with a personal visit at the earliest possible opportunity, normally within a few days.

7 FAM 412.3 Visit by Volunteers

If an immediate personal visit by an officer is not possible, the post may wish to consider enlisting cooperation of U.S. citizens residing in the area of the place of arrest to visit the detained U.S. citizen. Again, this does not eliminate the consular officer's responsibility to follow up with a personal visit as soon as possible, normally within a few days.

7 FAM 412.4 Consular Agents

Pending a visit by a consular officer, a consular agent (if one is available) should visit the arrestee promptly. Posts that have consular agents assigned within their districts should make maximum use of them in protecting the legal and human rights of incarcerated U.S. citizens and assuring their welfare. As a guide to what consular agents may be expected to do in such instances, posts should consult the Consular Agents' Handbook.

7 FAM 413 INITIAL VISITS

In the course of the initial visit to a U.S. citizen arrested or incarcerated abroad, the consular officer must endeavor to give the arrestee a realistic and positive understanding of the U.S. Government's interest in and responsibility for a citizen in this situation. While it is only fair to curb the prisoner's expectations of extraordinary intervention or miraculous remedies, the consular officer must emphasize the actions that can be taken on the arrestee's behalf. A U.S. citizen is entitled to claim consular protection abroad, regardless of evidence of guilt, the nature of the alleged crime, or the personal merit of the citizen. Thus, the consular officer must avoid any display of disdain, self-righteousness, or moral disapproval which might impair the relationship with the arrestee. The officer should accomplish several objectives during or as a result of the initial visit.

7 FAM 413.1 Verification of Citizenship and Identity

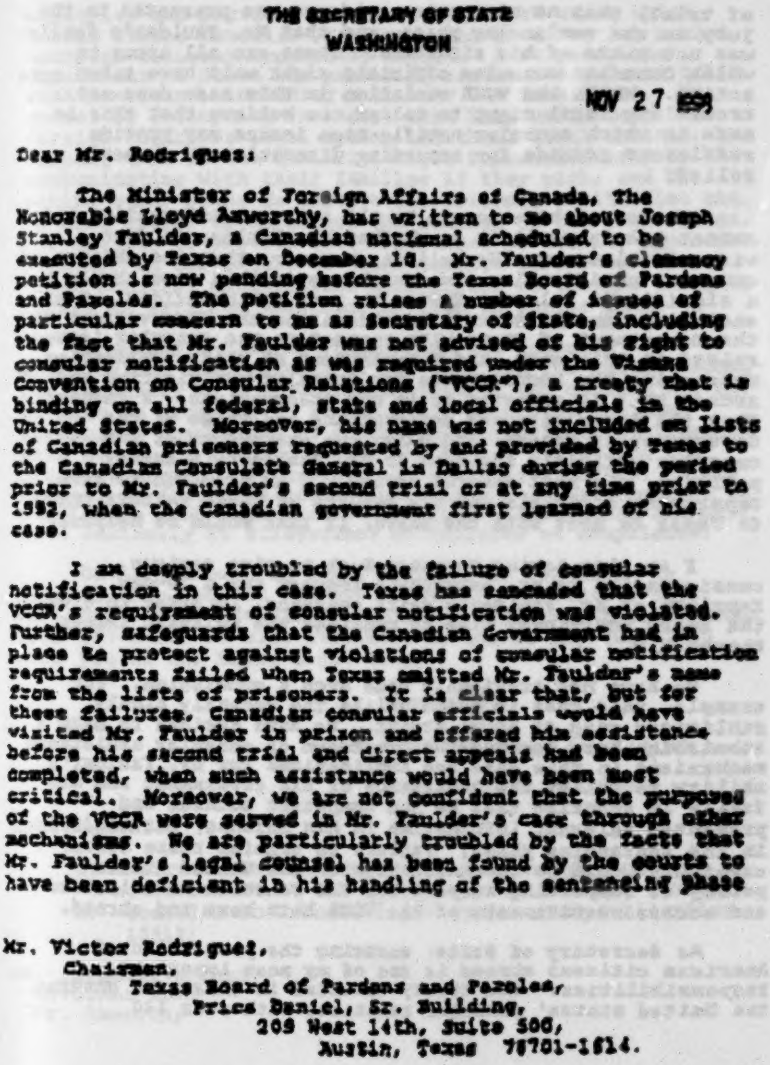
Before rendering any substantial service to an arrestee, the consular officer must ascertain that the individual is entitled to the protection of the U.S. Government by being one of the following:

a. A U.S. citizen. In the majority of cases, possession of a passport satisfactorily establishes both the identity and the citizenship of the individual. In countries where citizens customarily travel without passports, however, or where the individual claims a passport has been lost or stolen, the consular officer will have to rely upon secondary documentary evidence or judgment based upon the results of conversation with the prisoner (see chapter 7 FAM 1100 , entitled "Acquisition and Retention of U.S. Citizenship," and chapter 7 FAM 1200 , on Loss and Restoration of U.S. Citizenship, for further clarification).

Annex MG 61

LETTER OF U.S. SECRETARY OF STATE ALBRIGHT TO THE CHAIRMAN OF THE TEXAS BOARD OF PARDONS AND PAROLES

(27 NOVEMBER 1998)



THE SECRETARY OF STATE
WASHINGTON

NOV 27 1998

Dear Mr. Rodriguez:

The Minister of Foreign Affairs of Canada, The Honorable Lloyd Axworthy, has written to me about Joseph Stanley Faulder, a Canadian national scheduled to be executed by Texas on December 10. Mr. Faulder's clemency petition is now pending before the Texas Board of Pardons and Paroles. The petition raises a number of issues of particular concern to me as Secretary of State, including the fact that Mr. Faulder was not advised of his right to consular notification as was required under the Vienna Convention on Consular Relations ("VCCR"), a treaty that is binding on all federal, state and local officials in the United States. Moreover, his name was not included on lists of Canadian prisoners requested by and provided by Texas to the Canadian Consulate General in Dallas during the period prior to Mr. Faulder's second trial or at any time prior to 1992, when the Canadian government first learned of his case.

I am deeply troubled by the failure of consular notification in this case. Texas has conceded that the VCCR's requirement of consular notification was violated. Further, safeguards that the Canadian Government had in place to protect against violations of consular notification requirements failed when Texas omitted Mr. Faulder's name from the lists of prisoners. It is clear that, but for these failures, Canadian consular officials would have visited Mr. Faulder in prison and offered him assistance before his second trial and direct appeals had been completed, when such assistance would have been most critical. Moreover, we are not confident that the purposes of the VCCR were served in Mr. Faulder's case through other mechanisms. We are particularly troubled by the facts that Mr. Faulder's legal counsel has been found by the courts to have been deficient in his handling of the sentencing phase

Mr. Victor Rodriguez,
Chairman,
Texas Board of Pardons and Paroles,
Price Daniel, Sr. Building,
209 West 14th, Suite 500,
Austin, Texas 78701-1814.

of trial, that no mitigation evidence was presented to the jury in the sentencing phase, and that Mr. Faulder's family was not aware of his situation. These are all areas in which Canadian consular officials might well have taken some action. While the VCCR violation in this case does not create any legal right to relief, we believe that this is a case in which consular notification issues may provide sufficient grounds for according discretionary clemency relief.

We do not have access to all relevant information and cannot take a position on whether Mr. Faulder in fact warrants clemency. We believe, however, that the absence of consular notification and assistance in this case should be a significant relevant factor in your deliberations. I am enclosing for the Board's consideration the observations of the Department of State with respect to the consular issues raised in this case, and a Department of State publication concerning the requirements for consular notification and access that is referred to in our observations. I request that the Board give our observations and those of the Government of Canada, including the statements of its consular officials included in Mr. Faulder's clemency petition, the most careful review. I am prepared to have Department officials who are experts on these matters travel to Texas to meet with the Board, if that would be helpful.

I am also asking Governor Bush to give serious consideration to Mr. Axworthy's request for a 30-day reprieve of Mr. Faulder's death sentence, in order to give the Board additional time to consider the relevant issues thoroughly.

We have not previously made such a submission. For example, this case is quite unlike the recently highly publicized case of Angel Breard. We have decided to make a submission here because the breakdown of consular assistance mechanisms in this case had implications for Mr. Faulder's ability to enlist the assistance of his government and his family in ensuring that he had competent counsel and presented relevant information in his defense, particularly in the sentencing phase. Failure to examine these issues carefully would be inconsistent with the United States' policy of supporting respect for the consular notification and access requirements of the VCCR both here and abroad.

As Secretary of State, ensuring the protection of American citizens abroad is one of my most important responsibilities. The treaty violated in this case governs the United States' consular relations with over 140 countries and provides the basic framework under which United States consular officers under my direction assist American citizens imprisoned abroad. Last year, the Department of State was providing assistance to over 2,500 such Americans, including well over 300 from Texas. We assist by attempting to ensure that they understand the foreign country's legal system and their legal options, by helping them obtain qualified legal representation, by communicating with their families if they wish, and by taking other steps to improve the prisoner's situation and, in some cases, to influence the outcome of the proceedings. Our ability to provide such assistance is heavily dependent, however, on the extent to which foreign governments honor their consular notification obligations so that we can have access to detained Americans in time to assist them.

Ensuring worldwide respect for the consular notification requirements of the VCCR and for international law generally is a major responsibility and concern for me. We must be prepared to accord other countries the same scrupulous observance of consular notification requirements that we expect them to accord the United States and its citizens abroad. We cannot have a double standard. State as well as federal executive officials must be committed to compliance with consular notification requirements and must look seriously at allegations of failures of compliance.

David Andrews, my Legal Adviser, is available to discuss this request and may be reached at 202-647-9598. Assistant Legal Adviser for Consular Affairs Catherine Brown (202-647-4415) is also available to answer any questions that you or the Board might have.

Sincerely,

Madeleine Albright

Madeleine K. Albright

Enclosures:

1. Observations concerning the failure of consular notification in the case of Joseph Stanley Faulder
2. *Consular Notification and Access* (DOS Publication 10518)

cc. (w/observations):
Governor Bush
Mr. Axworthy

COUNTER-MEMORIAL
OF THE UNITED STATES OF AMERICA

CONTRE-MÉMOIRE
DES ÉTATS-UNIS D'AMÉRIQUE

LAGRAND CASE

(GERMANY V. UNITED STATES OF AMERICA)

COUNTER-MEMORIAL

SUBMITTED BY

THE UNITED STATES OF AMERICA

27 MARCH 2000

PART I

INTRODUCTION AND OVERVIEW

1. Pursuant to the Court's Order of 5 March 1999, the United States of America submits its Counter-Memorial in this case.

2. The case results from the failure of competent authorities of the United States to inform Walter and Karl LaGrand without delay of their right to have a German consular post notified of their arrest and detention following their 1982 arrest for murder. The competent authorities of a State Party are required to so inform arrested nationals of another State Party by the last sentence of Article 36(1)(b) of the Vienna Convention on Consular Relations ("the Vienna Convention" or "the Convention").[1] The United States of America and the Federal

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[1] Done at Vienna 24 April 1963. 21 UST 77; TIAS 6820; 596 UNTS 261. Article 36, paragraph (1) of the Vienna Convention states:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> *(a)* consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> *(b)* if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody

Republic of Germany are, and at all relevant times have been, States Party to the Vienna Convention. Accordingly, the failure promptly to inform the LaGrands of the right of consular notification as required by Article 36(1)(b) of the Vienna Convention was in breach of the United States legal obligations to Germany.

3. As will be discussed in Part II, the murder was committed in Arizona, and Walter and Karl LaGrand were arrested, detained, tried, and sentenced under the jurisdiction and laws of Arizona. Arizona officials were the "competent authorities" for purposes of the consular notification obligations of Article 36(1)(b) of the Vienna Convention with respect to them. The United States of America recognizes that under international law, it is internationally responsible for the actions of the State of Arizona.

4. The Federal Republic of Germany began to provide consular assistance to Walter and Karl LaGrand in 1992.

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pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested ... shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation ...

Insofar as we have been able to determine, the German Government did not raise the issue of consular notification with the U.S. Department of State or any other U.S. Federal authority until 22 February 1999, two days before Karl LaGrand's scheduled execution and only eight days before the filing of this case on 2 March 1999.[2]

5. In U.S. practice (and in the general practice of States Party to the Vienna Convention insofar as we can determine), when a sending State raises with the receiving State the possibility that consular notification obligations under Article 36 of the Convention have not been observed, the receiving State ordinarily investigates the allegation. If a violation is confirmed, it is appropriate to apologize for the violation and to take action as required to avoid any recurrence. Accordingly, upon learning of the German Government's concerns that led to the filing of this case, the Department of State initiated a careful inquiry into the consular notification issues related to Walter and Karl LaGrand. The process and results of that inquiry are described in the report at U.S.

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[2] The consular issue appears to have been raised for the first time in the letter from Foreign Minister Fischer to Secretary of State Albright dated 22 February 1999. Memorial of the Federal Republic of Germany dated 16 September 1999 (hereinafter "Memorial" or "German Memorial"), Annex MG 18, p. 528.

Exhibit 1.[3] That report has been provided to the German Government.

6. Through this inquiry, the United States confirmed that the competent authorities of the State of Arizona did not inform Walter and Karl LaGrand "without delay" that they could request that a German consular post be notified of their arrest and detention, as required by Article 31(1)(b) of the Convention. The United States of America bears responsibility for such non-performance of U.S. obligations under the Convention by Arizona. Accordingly, the United States acknowledges that, as a result of the failure to inform Walter and Karl LaGrand of their right to consular notification, there was a breach of a legal duty owed by the United States to the Federal Republic of Germany under the Vienna Convention.

7. On 18 February 2000, the U.S. Department of State presented to the Embassy of the Federal Republic of Germany the diplomatic note at U.S. Exhibit 2. In this note, the Department conveyed the apologies and regrets of the United States for the failure to comply with the international

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[3] A small number of documentary exhibits referred to in this Counter-Memorial are reproduced in an accompanying volume of U.S. exhibits. Volumes II and III of Germany's Memorial contain much relevant documentation. Instead of reproducing that material, this Counter-Memorial refers as appropriate to documents contained in Volumes II and III of Germany's Memorial.

legal obligation to inform the LaGrand brothers without delay that they could have a German consular post notified of their arrest and detention. The note also described the extensive efforts that the United States of America is making to improve understanding of and compliance with consular notification obligations throughout the United States, including in Arizona. With this note, the Department also provided a copy of the report of its investigation mentioned above.

8. The nation-wide program of actions aimed at preventing future cases of this kind involving nationals of Germany and of other States Party to the Vienna Convention is further described in Part II of this Counter-Memorial. The Department of State is engaged in an active program of outreach and education with federal, state and local law enforcement, judicial, and other authorities throughout the United States to ensure that those authorities know of and properly implement U.S. consular notification obligations under the Vienna Convention. The goal is to avoid, or in any case to reduce to the minimum, future failures to follow required consular notification procedures by authorities in any U.S. jurisdiction.

9. The United States has also invited the Government of Germany to raise with the Department of State any other cases in which it has concerns about compliance with consular notification obligations. The United States remains prepared to work with Germany to ensure that its nationals are properly informed that they may request consular assistance from Germany's consular posts in the United States.

10. Thus, the United States acknowledges and regrets that the competent authorities in the United States failed to comply with the consular notification obligations contained in Article 36(1)(b) of the Vienna Convention with respect to Walter and Karl LaGrand. The United States has officially apologized for this failure to the Government of Germany, and is taking extensive steps aimed at preventing a recurrence, both in Arizona and elsewhere in the United States. This goes to the heart of what Germany seeks through its first submission.[4]

11. Germany's Memorial and its other submissions set out several other matters on which Germany seeks the judgment of the Court. For the reasons explained in Part III, the Court should find these additional claims to be

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[4] German Memorial, para.7.02(1).

inadmissible. The remaining parts of this Counter-Memorial address the legal bases of Germany's additional claims, should the Court conclude that they are admissible. Part IV refutes Germany's claims of further violations of the Vienna Convention and of general international law. Part V answers Germany's claims regarding "procedural default" and shows that Article 36 does not require States Party to the Vienna Convention to create an individual remedy enforceable by individuals in national criminal proceedings. Part VI answers Germany's claims that the United States failed to comply with legal obligations arising from the Court's 3 March 1999 Order indicating provisional measures. Part VII addresses Germany's demand that the Court require the United States to provide a guarantee against future repetition. Part VIII summarizes the case and contains the U.S. submissions to the Court.

12. As Germany's Memorial makes clear, this case does not concern the position of capital punishment in international law:

> Germany wants to emphasize that its Application is not directed against capital punishment, neither in general nor in regard to the way the death penalty is applied in any particular country.[5]

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[5] German Memorial, para. 1.08.

As the Court has made clear here, as with Paraguay's previous case related to consular notification under Vienna Convention:

> **The issues before the Court in this case do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes.**[6]

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[6] *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 15, para. 25 (Hereinafter "Order of 3 March 1999"); *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 257, para. 38.

PART II

THE FACTS

13. The facts of this case are less complex and less contested than those in other cases now before the Court, but there are important omissions from Germany's narrative. There are also some material disagreements on factual inferences to be drawn as to certain matters. This Part seeks not to repeat information contained in the Memorial, but it will address some matters not discussed there that help to explain (if not excuse) the acknowledged failure to comply with Article 36(1)(b). This Part also addresses Germany's attempt to justify its last-minute filing of this case.

CHAPTER I

FACTS REGARDING THE LAGRAND BROTHERS

14. There is no substantial dispute regarding the fact that Walter and Karl LaGrand together attempted an armed bank robbery in Marana, Arizona, on 7 January 1982. During the attempted robbery, Ken Hartsock, the bank manager, was murdered and Dawn Lopez, a bank employee, was repeatedly stabbed and almost killed. Letters from senior German officials to their United States counterparts acknowledge both the brothers' guilt and that they were fairly tried. President Herzog wrote to President Clinton on 5 February 1999 that:

> In no way do I doubt the legitimacy of the conviction nor the fairness of the procedure before the courts of the State of Arizona and the federal courts.[7]

German Minister of Justice Däubler-Gmelin wrote to U.S. Attorney General Reno on 27 January 1999 that:

> It is beyond dispute that the LaGrand brothers committed a dreadful crime, marked by the fact that it was carried out with particular brutality. From my point of view as well, there are no doubts about the gravity of the guilt these sentenced offenders bear for the crime they committed, nor are there any doubts about the fact that the proceedings were conducted under the Rule of Law - ultimately leading

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[7] Memorial, Annex MG 14, p. 511.

> to imposition of the death penalties with final and binding effect - before the courts of the State of Arizona and before the Federal Courts.[8]

15. There also does not appear to be dispute regarding the circumstances of the LaGrand brothers' births and their move to the United States, although there are some differences in characterization. The brothers were born out of wedlock in Germany to a mother of German nationality and fathers of U.S. nationality. Walter was born on 26 January 1962 and Karl on 10 October 1963. A third U.S. citizen serviceman stationed in Germany with the U.S. Army, Masie LaGrand, subsequently married their mother and adopted Walter, Karl, and their half-sister. Masie LaGrand brought his German wife and three adopted children to the United States in February 1967. At that time, Walter was five years old and Karl almost three-and-a-half. The brothers never returned to Germany except to live in a U.S. military housing complex associated with the U.S. Army base in Mannheim, Germany, for about five months in 1974. Thus, although the Memorial speaks broadly of "the upbringing of the boys in Germany"[9] in fact they were

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[8] Memorial, Annex MG 20, p. 541.

[9] Memorial, para. 2.03.

largely brought up in the United States after living in Germany for five and three years in their early lives.

16. By the time of the January 1982 murder, the brothers appeared in all respects to be native citizens of the United States. Their language was English, not German. Their appearance, mannerisms, and characteristics were those of citizens of the United States, not of Germany. Indeed, it appears that their adoptive father thought that they had in fact become U.S. citizens, and that the brothers at times identified themselves as U.S. citizens.[10]

17. There is also no dispute that, although they were fully American in outlook and characteristics and spoke little or no German, Walter and Karl LaGrand were in fact German citizens and not citizens of the United States. The fact that the brothers' natural fathers were both U.S. servicemen stationed in Germany was not sufficient to make the brothers United States citizens under the relevant citizenship laws of the United States.[11] In addition, the

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[10] *See* Walter and Karl LaGrand: Report of Investigation into Consular Notification Issues, U.S. Exhibit 1, pp. 2-3.

[11] A child born out of wedlock outside the United States to a non-U.S. citizen mother and a U.S. citizen father in the years 1962 and 1963 would have acquired U.S. citizenship only if, prior to the child's birth, the U.S. citizen father had been physically present in the United States or its outlying possessions for ten years prior to the birth, at least five of which were after the age of 14, and the child's paternity had been established by legitimation before the child's 21st birthday.

fact that the LaGrand children were adopted by a U.S. citizen father did not automatically confer U.S. citizenship upon them. Their adoptive father, Masie LaGrand, could have arranged for Walter and Karl LaGrand to be naturalized as U.S. citizens by completing the necessary application and process.[12] Masie LaGrand never did this however, apparently because he mistakenly thought that his adopted children had automatically become U.S. citizens. Had Walter and Karl LaGrand acquired U.S. citizenship, they would have lost their German citizenship under the U.S.-German Treaty Establishing Friendly Relations of 25 August 1921.[13] The United States accepts, however, that Walter and Karl LaGrand acquired German nationality through birth in Germany to a German mother and remained German nationals until their deaths in 1999.

18. There also is no substantial dispute that Walter and Karl LaGrand had difficult and deeply troubled lives. As children, they repeatedly experienced rejection by their

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[12] Masie LaGrand could have applied for naturalization of his adopted children pursuant to former Section 323 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1434, until its repeal in 1978; after 1978, he could have applied pursuant to what is now Section 320, 8 U.S.C. 1433, provided the child to be naturalized was under the age of 18. (Section 323 was repealed in 1978 by Section 7 of Public Law 95-417.)

[13] Signed Aug. 25, 1921; entered into force Nov. 11, 1921. 42 Stat. 1939; 8 Bevans 145; 12 LNTS 192.

mother and their adoptive father. During their early years in Germany, their care was at times turned over to institutions. After they moved to the United States at ages five and three, this pattern continued. Their mother took little or no interest in the brothers and welcomed their placement in foster care. Their adoptive father apparently became abusive and in any event eventually abandoned the brothers and their mother and sister. Arizona State records contain numerous details of how the brothers felt rejected by their mother, angry, and frustrated by their situation. Eventually the brothers drifted into anti-social and ultimately violent criminal behavior, culminating in the murder of 7 January 1982.

CHAPTER II

THE MULTIPLE APPELLATE PROCEEDINGS

19. Germany's Memorial lists the extensive series of appellate and other legal proceedings brought by the LaGrand brothers to challenge their convictions and sentences.[14] Because the brothers faced capital punishment, these appeals were particularly rigorous. The convictions and sentences of the Arizona trial court were first reviewed and affirmed by the Arizona Supreme Court. The United States Supreme Court then declined to exercise its discretion to grant further review.[15] As was their right, the LaGrands then sought review of their convictions and sentences by a federal district court under the habeas corpus provision of the United States Constitution. (Habeas corpus proceedings provide a vehicle for persons in detention to challenge the lawfulness of their detention in a court of law.) The federal district court upheld the convictions and sentences. Its decisions were then reviewed and affirmed by an intermediate federal court of

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[14] Memorial, para. 2.04 *et seq.*

[15] *Arizona v. Walter Burnhart LaGrand*, 153 Ariz. 21, 734 P.2d 563 (1987) (Memorial, Annex MG 3, p. 293), *cert. denied*, 484 U.S. 872 (1987); *Arizona v. Karl Hinze LaGrand*, 152 Ariz. 483, 733 P.2d 1066 (1987) (Memorial, Annex MG 4, p. 305), *cert. denied*, 484 U.S. 872 (1987).

appeals, and the United States Supreme Court then declined for a second time to exercise its discretionary jurisdiction.[16] Through these appeals, appropriate judicial authorities determined that the LaGrands' defense lawyers had provided a constitutionally sufficient level of representation and that the sentencing judge had appropriately considered the mitigation and other evidence relevant to sentencing.

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[16] *Karl and Walter LaGrand v. Lewis,* 883 F.Supp 451, 469 (1995), *aff'd,* 133 F.2d 1253 (9th Cir. 1998), *cert. denied,* 119 S.Ct. 422 (1998) (Memorial, Annexes MG 8-11, pp. 453 *et seq.*)

CHAPTER III

EFFORTS BY THE UNITED STATES TO IMPROVE COMPLIANCE

20. The United States accepts that effective compliance with the consular notification requirements of Article 36 of the Vienna Convention requires constant effort and attention. As described in the attached Declaration of M. Elizabeth Swope, the Department of State's Senior Coordinator for Consular Notification,[17] the Department of State is working intensively to improve understanding of and compliance with consular notification and access requirements throughout the United States, so as to guard against future violations of these requirements.[18] This effort has included the January 1998 publication of a booklet entitled *Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials To Assist Them*,[19] and development of a small reference card

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[17] Declaration of M. Elizabeth Swope of 14 March 2000, U.S. Exhibit 3.

[18] *Ibid.*

[19] Excerpts are reproduced at U.S. Exhibit 4. A copy of this publication is being provided to the Library of the Court. Courtesy copies were provided in 1998 to all Embassies in Washington, D.C., and later to all foreign consulates in the United States.

designed to be carried by individual arresting officers.[20] As of March 2000, the Department had distributed approximately 44,000 booklets and over 300,000 cards to arresting officers, prosecutors, and judicial authorities in every state and in other jurisdictions such as the District of Columbia. The Department also has made the booklet available through libraries and the Internet, through which it has been accessed thousands of times.[21] The booklet is now widely available to, and used by, criminal defense lawyers, detainees, and members of the public as well as by federal, state, and local officials.

21. Consular notification and access obligations have also been reviewed at numerous training seminars and meetings throughout the United States. Many of these events have been held in states with significant populations of foreign nationals. Department of State officials have traveled for this purpose to Arizona, California, Florida, Illinois, Massachusetts, New Jersey, New Mexico, New York, North Carolina, Texas, Virginia, and Washington State. Department officials have also spoken

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[20] U.S. Exhibit 5.

[21] The booklet is available at: http://www.state.gov/www/global/legal_affairs/ca_notification/ca_prelim.html

about consular notification and access issues at a number of regional or national events, such as special conferences of the states that border Mexico, seminars on international prisoner transfer, international and regional police chiefs and sheriffs meetings, and meetings of federal and state prosecutors.

22. Similar educational efforts in other states of the United States are continuing. In coming months, the Department of State will be conducting programs on consular notification in California, Hawaii, Nevada, Pennsylvania, Texas, and Utah.[22]

23. As part of its ongoing efforts in many states, the Department of State has worked closely with the State of Arizona, which has taken a number of specific steps to ensure that consular notification is provided when required. The Attorney General of Arizona sent all Arizona county attorneys a memorandum advising them of the requirements of the Vienna Convention and providing excerpts from and information about the Department of

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[22] So that the full scope of consular notification obligations will be understood and observed, the Department is also working to educate coroners and other officials responsible for reporting deaths (Vienna Convention Article 37(a)) and judges involved in the appointment of guardianships (Article 37(b)). It has also taken steps to ensure the provision of consular notification in cases of ship wrecks and air crashes (Article 37(c)).

State's booklet, and has also written to the Chief Justice of the Arizona Supreme Court suggesting a change in the rules of the courts of Arizona that would help ensure compliance. The Arizona Department of Corrections has compiled and distributed within the Department of Corrections a list of consular offices in the United States in or nearest to Arizona, and has adopted new consular notification procedures.[23] These and other specific instructions issued by Arizona authorities have been supplemented by wide distribution within Arizona of the Department of State's booklet, and by numerous training sessions. The Arizona Attorney General's Office is continuing to work on these and other initiatives to improve understanding of and compliance with consular notification and access obligations throughout the state.

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[23] Pursuant to these new procedures, Karl and Walter LaGrand were given formal notification of their right to contact their consular officials on December 21, 1998. Memorial, Annex MG 12, p. 499. Clearly this notice came too late to constitute compliance with Article 36 in this case, but it is concrete evidence that the procedures now in place in Arizona are being followed.

CHAPTER IV

GERMANY'S SPECULATIVE AND UNJUSTIFIED CLAIMS ABOUT THE IMPACT OF CONSULAR ASSISTANCE

Section I. Introduction

24. Although the parties seem to be in broad agreement about many of the facts, there are some significant differences. The most important relate to Germany's suppositions about what might have occurred had the LaGrand brothers been properly informed of the possibility of consular notification.[24] First, the Memorial presumes that, had the brothers been told in January 1982 that a German consular post could be notified of their arrest, they would have requested such notification. (The notification would have been given to the German Consulate General in Los Angeles, approximately 700 kilometers/415 miles away from Marana, Arizona.) Second, the Memorial argues that German consular officers from Los Angeles would have given rapid and extensive assistance to the LaGrands' defense counsel before the LaGrands' December 1984 sentencing, including obtaining from Germany evidence about

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[24] Memorial, paras. 4.53 *et seq.*

the LaGrands' early childhoods before they moved to the United States in February 1967. Finally, the Memorial insists that such consular assistance would have fundamentally changed the outcome of the sentencing proceedings, because consular officers would have provided important evidence not otherwise available to the judge that would have persuaded him not to sentence the brothers as he did. All three lines of argument rest on speculation about what might have happened had the LaGrand brothers been told in 1982 that they could have the German Consulate General in Los Angeles notified of their arrest and detention. None withstands analysis.

Section II. The Brothers Had No Ties with Germany

25. First, the evidence undermines rather than supports Germany's belief that the LaGrand brothers would have requested in 1982 that the German Consulate General in Los Angeles be notified. As the Memorial recognizes, the Vienna Convention leaves it entirely to the arrested person to request consular notification.

> [I]t is for him or her alone to decide whether he or she wants the consulate to be contacted or not.[25]

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[25] Memorial, para. 4.11. Germany seems to criticize Arizona authorities for not directly informing the German Consulate General of the LaGrand's arrest, Memorial para. 4.12. However, as the Memorial

However, foreign nationals -- particularly those who do not have strong connections with the sending State -- do not uniformly request that their consular officials be notified after they are informed that such notification is a possibility.[26]

26. As described in the report of the Department's investigation,[27] the LaGrand brothers were thoroughly American in identity and outlook when arrested in 1982. The German Government played no role in their lives after they moved to the United States in 1967 at ages five and three. Neither brother had ever been individually documented as a German national, even when they returned to Germany for a few months in 1974, when they appear to have traveled on U.S. military travel orders. There is no indication that either brother viewed himself as German in 1982, or would have looked to the German Government as a potential protector or source of assistance. Even after German consular officials established contact with the

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acknowledges, such "notification of the consulate without or against the will of the person concerned is excluded." Memorial, para. 4.11.

[26] Declaration of Edward Betancourt, U.S. Exhibit 8, p. 5.

[27] U.S. Exhibit 1, p. 3.

LaGrands in 1992, Walter LaGrand at least twice refused consular visits.[28]

27. At the time of their arrests, the brothers did not identify themselves to the arresting officers as Germans. The evidence indicates that Walter identified himself to detaining authorities as a U.S. citizen; Karl either made a similar identification, refused to state his citizenship, or did not know his citizenship.[29] The family and friends that Walter and Karl identified as points of contact when arrested were all in Arizona. The brothers' cultural identity was American throughout. It is thus implausible that two young men who showed little sense of being German and who were totally disconnected from Germany would have asked the Arizona officials responsible for their arrest or detention to notify the German Consulate General in Los Angeles that they had been arrested.

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[28] U.S. Exhibit 1, p. 9.

[29] Indeed, Germany's Memorial implies that the brothers may have come to realize their German nationality only after their arrest. Memorial, para. 6.83. ("[A]fter the brothers had become aware of their German nationality, they raised the violation of Article 36 of the Vienna Convention ... .")

Section III. The Memorial's Unjustified Claims About Consular Assistance

28. Nor does the Memorial credibly support its contention that a German consul would have immediately assisted the LaGrand brothers or significantly aided their legal defense, had the German Consulate General in Los Angeles been notified earlier.[30] Reference to present-day policies does not prove how German consuls performed their duties eighteen years ago. Part V considers the limited and discretionary nature of a consul's role when a national is detained, and shows how that role is often quite different from the idealized portrait presented in the Memorial. Most importantly, consular officers cannot act as lawyers. The assistance they provide to a defendant in a criminal proceeding is limited to assisting in obtaining legal counsel and then assisting legal counsel -- if

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[30] Perhaps recognizing the speculative character of many of its factual arguments, Germany contends that "the burden of proof for the impact of the violation is to be borne by the United States." Memorial, para. 4.52. Germany cannot so easily evade the basic principle that "[u]ltimately, ... it is the litigant seeking to establish a fact who bears the burden of proving it." *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 437, para. 101. The ambiguities and unproven assumptions throughout Germany's case involve matters that are or can be known to Germany. The Court "cannot ... apply a presumption that evidence which is unavailable would, if produced, have supported a particular party's case; still less a presumption of the existence of evidence which has not yet been produced." *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening), Judgement of 11 September 1992, I.C.J. Reports 1992*, p. 399, para. 63.

requested -- within the limits of the consular officer's authorities and resources.

29. Germany has provided little support for its assertions that German consular officers would have retained different defense lawyers, that they would have aided the LaGrands' defense counsel in 1982-84 by seeking additional information about the brothers' early childhoods in Germany, or even that German consular officials would have responded at all. To show what a German consul might have done, the Memorial cites a 1993 memorandum of law filed by a U.S. defense lawyer in a U.S. criminal proceeding.[31] That memorandum contains several careful references to what German consuls "could have" or "may have" done, not what they "would do" or "had done". These hedged speculations in a legal brief are not evidence. The Memorial also cites the German Federal law on Consular Assistance and a current Circular Order of the German Foreign Ministry describing the responsibilities of German consuls.[32] There is a suggestion that these current regulations continue past practices, but there is no claim that they correspond to the regulations in force in 1982 or

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[31] Memorial, para. 4.53 n. 214, citing a brief of a LaGrand lawyer at Annex MG 46, p. 942.

to the practices of the German Consulate General in Los Angeles at that time. Nowhere is there any statement by any informed German official familiar with German consular practice in Los Angeles in 1982.

30. The actions of the German Consulate General in Los Angeles when it ultimately learned of the LaGrand brothers in June 1992[33] may offer a more realistic indication of consular practice. The Consulate General's response suggests that German authorities had doubts about whether the brothers were German nationals at all, or whether urgent consular assistance to them -- or perhaps any assistance -- was appropriate. Clearly, the Consulate General did not rush to assist the brothers. Apparently, two other Germans in prison with the LaGrands were receiving consular visits and prompted a contact between the brothers and the Consulate General in June 1992. The Memorial states that the German Consulate General thereafter "[i]mmediately ... engaged in a careful and comprehensive inquiry into the nationality status of the two brothers."[34] That inquiry was indeed "careful and

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[32] Memorial, para. 4.54.

[33] Memorial, paras. 2.06 and 3.73.

[34] Memorial, para. 3.73.

comprehensive" -- indeed, it appears to have been slow, deliberate, and even skeptical. Not until November 1992 did a German consular officer write to the U.S. Immigration and Naturalization Service for information about the LaGrands' immigration status in the United States. Only on 8 December 1992 did a German consular officer visit the LaGrands.[35] The LaGrands' German nationality was not officially documented by Germany until 15 March 1993.[36]

31. The German Consulate General's slow and cautious response conflicts with Germany's assertions that its consuls would have sprung immediately into action in 1982, had they learned that two native English-speakers long resident in the United States, but who claimed to be German, faced charges for a murder in a small Arizona town. It seems particularly doubtful that consular officials would have responded quickly because the brothers had no documentation at hand to prove that they were German nationals. They had no German passport or identification card, having been included in their mother's long-since-expired German passport when they first came to the United States as small boys in 1967.

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[35] Memorial, para. 2.06.

[36] Memorial, para. 3.73 and Annex MG 41, p. 801.

32. It is also important to remember that the LaGrands' defense was at all times the responsibility of their defense attorneys. Just as Germany's compilation of information from Germany about the LaGrands after 1992 was at the behest of the lawyers then assisting them, the LaGrands' defense lawyers in 1982-1984 would have decided what requests for assistance to make to a consular officer. There is no indication that Walter or Karl LaGrand's defense lawyers in 1982-1984 would have asked German consular officials to obtain additional evidence about the brothers' lives in Germany. Both defense lawyers knew that the LaGrands had been born in Germany, but apparently elected not to seek evidence about their early childhoods there.

33. The German Memorial castigates the brothers' defense counsel, *inter alia*, because they did not "raise or investigate mitigating circumstances linked to the upbringing of the brothers in Germany under extremely difficult social conditions."[37] If the LaGrands' defense counsel warrant the criticisms directed against them, then it is hardly likely that they would have sought help from a German consular officer to obtain such evidence. However,

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[37] Memorial, para. 2.03. *See* Memorial, paras 4.68-4.79.

it may well be that the LaGrands' defense counsel simply did not think such evidence would add much strength to the brothers' defense.

34. It was not unreasonable for the LaGrands' trial counsel not to seek additional information from Germany. Information about the brothers' early years was available from Walter and Karl LaGrand themselves and from their sister, and was reflected in pre-sentence materials prepared for the sentencing judge. Moreover, by 1984, when the brothers were sentenced, their early years in Germany were remote and relatively less significant than the seventeen years since they left Germany. Those seventeen troubled years were well documented. Thus, ample mitigation evidence about the LaGrands' dysfunctional childhoods, including their early years in Germany, was provided to the Court. Defense counsel did not need to reach for additional documentation from Germany relating to the time years before when the brothers were five and three years old.

35. German consular officials' actions after they finally began to assist the LaGrand brothers also conflict with Germany's claims. Germany explains its last-minute filing by arguing that German officials only learned at a

clemency hearing on 23 February 1999 that Arizona authorities knew of the LaGrands' German nationality long before. We believe this stems from a reference made by an attorney for Arizona at the clemency hearing to the brothers' 1984 pre-sentence reports,[38] official court documents crucial to understanding the sentences imposed.[39] The 1984 reports were available to German officials and are the second exhibit to Germany's Memorial. If they were not reviewed by German consular officials after they learned of the case in 1992, then those officials clearly did not see their role to include evaluating the evidence considered at sentencing. This directly conflicts with Germany's claims that a German consular officer in 1982-1984 would have worked to evaluate and supplement the evidence presented to the judge regarding the LaGrands' troubled early childhoods.

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[38] Memorial, Annex MG 2, pp. 253-289. Walter and Karl LaGrand are identified on the first pages of their 1984 pre-sentence reports as citizens of Germany. *Ibid.*, pp. 253 and 268.

[39] The Memorial does not clearly describe Germany's understanding of events at the 23 February 1999 clemency hearing, although it suggests that the hearing somehow revealed that Arizona officials knew of the LaGrands' German nationality as early as 1982. Memorial, para. 1.03. Our understanding is that Counsel for the State of Arizona referred to the 1984 pre-sentence report at the 23 February hearing, in order to show that evidence about the brothers' childhoods was available at sentencing. German representatives apparently viewed this as an indication of bad faith by Arizona.

36. If German consuls never requested or read the 1984 pre-sentence reports, claims of their diligence and effective assistance are unpersuasive. But if German consuls did review them, Germany knew long before the last-minute filing of this case that some Arizona officials had learned of the LaGrands' German nationality during the 1980s.

Section IV. The Memorial's Exaggerated Claims About the Potential Impact of Mitigation Evidence

37. The Court should also reject the Memorial's supposition that Germany would have located mitigation evidence that surely would have persuaded the sentencing judge to be lenient. The Memorial makes such claims many times, with varying degrees of assurance,[40] often echoing arguments made to and rejected by United States courts. Yet, as Germany's Memorial acknowledges, the brothers' lawyers did ask the sentencing judge to consider in mitigation Walter and Karl's grim and dysfunctional family

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[40] At para. 4.51, the Memorial is categorical: had consuls been involved, "the brothers would not have been executed." Para. 1.01 is somewhat less confident. ("There are compelling reasons to believe that the LaGrands would have escaped the death penalty ... .") Para. 4.56 seems more careful. (Assistance "likely would have saved their lives.") None of these statements is credible in light of the circumstances described here.

background.[41] Their deprived and unsettled childhood was described in the pre-sentence reports and in testimony by the two defense expert witnesses and of the brothers' sister at the pre-sentence hearing. The pre-sentence reports included a great deal of information, and concluded that, in mitigation, the judge could consider the fact that the LaGrands' actions "may have partially resulted from a poor home environment, lack of family stability, broken home, poverty, and/or a lack of education."[42]

38. The reports offered significant information about the LaGrands' troubled childhoods, including the periods of their early childhood spent in Germany. For example, the pre-sentence report for Walter LaGrand attaches a more detailed earlier report dated 4 December 1980, which contains, *inter alia*, the following information:

> The defendant [Walter LaGrand] was second of three illegitimate children born of different fathers while his mother lived in Augsburg, Germany. He reports that his father was Puerto Rican and had left without marrying his mother before the defendant was born. He reports that his mother placed the children in a convent when they were very young, as she was unable to take care of them because she was required to work to support the family. She eventually married a

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[41] Memorial para. 4.61.

[42] Memorial, Annex MG 2, p. 259.

> Black American soldier, who adopted her three children, at which time the defendant's mother retrieved the children from the convent to live with her and her husband."

(This attachment is contained in the Arizona court's file; we do not know if it was included with the report as obtained by German consular officials. It is reproduced at U.S. Exhibit 6.) One of the psychiatrists who testified in the sentencing phase also noted that the boys' early lives in Germany had been especially difficult.[43]

39. Thus, the sentencing judge had information about the LaGrands' first five and three-and-a-half years of life in Germany, and additional evidence about those few years in Germany would have been cumulative. Defense counsel and the judge also had available extensive information of similar character about the brothers' troubled family lives during the much longer period after they moved to the United States. No evidence about the LaGrands' early years in Germany was as significant as this chronicle of their subsequent experiences over the seventeen years between leaving Germany and being sentenced in 1984.

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[43] Transcript of the Aggravation-Mitigation Hearing, Memorial, Annex MG 5, pp. 355 and 363.

40. There is no doubt that the Judge Hannah considered the mitigating circumstances presented to him. He stated that:

> I've also considered in mitigation their unhappy and disruptive childhoods and family lives, lack of a male role-model, their expressed remorse ... and I have considered the psychological and psychiatric evidence offered on their behalf and the other evidence that was presented at the mitigation hearing, both documentary and oral.[44]

Whatever mitigating evidence Germany might have added at the sentencing stage would not have portrayed a fundamentally different picture.

41. The Memorial correctly points out that, under Arizona law, a difficult childhood or family history can be mitigating, but it also acknowledges that Arizona law also requires a causal connection between the upbringing and the murder.[45] The Memorial offers only speculation that the LaGrands' early experiences in Germany had some special causal connection to the murder, or were more relevant to the murder than the subsequent fifteen years after they left Germany. Arizona has identified numerous cases in

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[44] Transcript of Entry of Judgment and Sentencing, 14 December 1984, Memorial, Annex MG 6, p. 440.

[45] Memorial, para. 4.65.

which such mitigation evidence was offered but was not shown to have been linked to the criminal behavior.[46]

42. More importantly, Arizona law requires that mitigation evidence be balanced by the court against evidence that the crime was "aggravated" and that the brothers would continue to be a danger to society. Such evidence included the graphic and deeply disturbing testimony of Dawn Lopez, who witnessed the murder of the bank manager and was herself stabbed repeatedly. If it chooses to review the videotapes provided to the Court by Germany, the Court will see that even seventeen years later, at the hearings of the Arizona Board of Executive Clemency, Dawn Lopez' horror at the memory of her experience was undiminished. The evidence in support of capital punishment also included evidence of prior violent behavior by both brothers. The sentencing judge also found other aggravating circumstances, including that the murder was committed "in the expectation of the receipt of something of monetary value," and that it was committed

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[46] *See, e.g.*, *State v. Clabourne*, 298 Ariz. Adv. Rep. 12 (1999); *State v. Djerf*, 191 Ariz. 583, 959 P.2d 1274 (1998); *State v. Lee* (1), 189 Ariz. 590, 944 P.2d 1204 (1997); *State v. Hedlund*, 185 Ariz. 567, 917 P.2d 200 (1996); *State v. Bolton*, 182 Ariz. 290, 896 P.2d 830 (1995); *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993); *State v. White*, 168 Ariz. 500, 815 P.2d 869 (1991).

> in an especially heinous, cruel or depraved manner, stabbing a helpless, defenseless man 26 times, inflicting gratuitous violence on that victim after threatening his life several times while he was a helpless captive and kept uncertain as to his fate.[47]

The judge concluded that "the murder was senseless and the manner of causing death was savage."[48]

43. It is extremely doubtful that any further evidence about the boys' early childhood that might have been added in 1984 would have changed the judge's finding that there were "no mitigating circumstances sufficient to call for leniency or to outweigh the aggravating factors."[49] Given the information already available to the judge, and the significant aggravating circumstances he identified, the claim that some additional evidence about the brothers' early childhoods would have changed the balance is simply not persuasive.

44. Arizona officials have indicated that imposition of capital punishment was consistent with the outcome in other cases in which similar aggravating and mitigating circumstances were present, and have identified other

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[47] Transcript of Entry of Judgement and Sentencing, 14 December 1984, Memorial, Annex MG 6, p. 439.

[48] *Ibid.*, p. 440.

similar murder cases in which the defendant was also sentenced to capital punishment. In the same vein, Detective Weaver Barkman, who investigated the murder and received Karl LaGrand's confession, has recently confirmed that imposition of capital punishment in this case seemed appropriate to him at the time. Germany's Memorial emphasizes Mr. Barkman's supposed doubts about the LaGrand brothers' sentences, based on the affidavit of a U.S. Federal Public Defender.[50] Mr. Barkman, however, denies the accuracy of the comments attributed to him in that affidavit. Instead, in a recent Declaration, he has stated that at the time he was not opposed to or disturbed by the sentences imposed.[51]

45. Thus, the Court should not accept the Memorial's central suppositions that the LaGrands would have requested consular assistance from a country with which they had little connection; that, if contacted, German consuls in 1982-84 would have significantly assisted their defense attorneys; and that any assistance that German consuls might have provided would have persuaded the judge not to

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[49] *Ibid.*, pp. 440-441.

[50] Memorial, para. 4.67. The Federal Public Defender's affidavit is Germany's Annex MG 53, pp. 1219-1220.

[51] Weaver Barkman's Declaration of 11 February 2000 is U.S. Exhibit 7.

pass sentence as he did. Germany, which has the burden of establishing the facts underlying its arguments, offers little but supposition to support these claims. Matters such as the LaGrand brothers' lack of connection with Germany, the cautious conduct of German consuls in 1992, and the extensive evidence about the brothers' past lives already available to the Arizona court when the LaGrands were sentenced, shows that Germany's suppositions are not persuasive.

PART III

ADMISSIBILITY

CHAPTER I

INTRODUCTION

46. Germany's final submissions[52] call for four forms of relief against the United States. Briefly stated, Germany asks the Court to declare or order that:

(1) the United States violated Article 36(1)(b) of the Convention and related legal obligations;

(2) certain rules of U.S. domestic law, particularly the doctrine of procedural default, violate Article 36(2) of the Convention;

(3) the United States violated international legal obligations related to the Court's Order of 3 March 1999; and

(4) the United States must provide Germany a guarantee against recurrence.

Jurisdiction as to all four claims is asserted to exist under Article I of the Optional Protocol to the Vienna

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[52] Memorial, para. 7.02.

Convention,[53] to which both Germany and the United States are parties.

47. The United States acknowledges that there was a breach of the U.S. obligation under Article 36(1)(b) of the Convention promptly to inform the LaGrand brothers that they could ask that a German consular post be notified of their arrest and detention. The United States has apologized to Germany for this breach, and is taking extensive measures seeking to avoid any recurrence. In relation to Germany's first submission, the United States does not contest the Court's jurisdiction under the Optional Protocol to enter a judgment regarding this acknowledged breach of Article 36(1)(b).

48. Without prejudice to its position in any further proceedings in this case, or in any future cases where jurisdiction is claimed to exist under the Optional Protocol, the United States will not here address the Court's jurisdiction to entertain Germany's remaining claims. Instead, for the reasons set out in this Part, the United States urges that the Court hold those remaining claims to be inadmissible.

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[53] Optional Protocol to the Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, done at Vienna 24 April 1963, 21 UST 325, 596 UNTS 487.

CHAPTER II

GERMANY'S OTHER CLAIMS ARE INADMISSIBLE

49. Admissibility requires the Court to weigh whether characteristics of the case before it, or special circumstances related to particular claims,. may render either the entire case or particular claims inappropriate for further consideration and decision by the Court. Assessing admissibility involves careful analysis of the particular characteristics of cases and claims, the positions of the parties, the role and responsibilities of the Court in the international system, and the application of the Statute and Rules of Court. In the circumstances here, significant factors weigh against admitting the claims that underlie Germany's second, third, and fourth submissions.

Section I. The Court Need Only Address Germany's First Submission in Order to Do Justice Between the Parties

50. The United States does not contest Germany's basic claim of a breach of the notification obligation under Article 36(1)(b) of the Vienna Convention, and has expressed its regret that there was such a breach in the cases of Karl and Walter LaGrand. Extensive remedial actions are being taken in order to reduce the chances of

recurrence. In these circumstances, the Court can render a judgment recording the breach of Article 36(1)(b), the apology of the United States, and noting that appropriate remedial measures are being taken. Such a judgment would resolve and do justice as to the central dispute between the Parties and affirm the importance of the Vienna Convention in international relations. The Court need not conduct the additional proceedings required to hear and decide Germany's remaining claims in order to discharge its role appropriately. (In any case, as the following Parts show, Germany's remaining claims are deeply flawed on their merits.)

Section II. Germany's Remaining Claims Are Inadmissible Because Germany Asks the Court to Assume an Inappropriate and Unauthorized Role as the Overseer of U.S. National Courts

51. The claims underlying Germany's second, third, and fourth submissions are inadmissible because Germany seeks through those claims to have the Court play the role of ultimate court of appeal in national criminal proceedings. Many of the Memorial's arguments, particularly regarding the rule of procedural default, but as to other issues as well, ask this Court to substitute its judgment for considered decisions of national courts in

criminal cases. This would improperly transform and expand the Court's role, making it the overseer of national judicial systems in criminal cases.

52. Both in its Order of 9 April 1998 in *Paraguay v. United States*, and again in its Order of 3 March 1999 in this case, the Court properly observed that:

> [T]he function of this Court is to resolve international legal disputes between States, *inter alia*, when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal.[34]

Germany's Memorial, however, asks the Court to address and correct not only claims under international law but asserted violations of U.S. law and errors of judgment by U.S. judges. The Memorial's lengthy discussions of U.S. domestic law are replete with invitations for the Court to take corrective action because U.S. courts have not applied U.S. law "correctly." A sample passage argues that:

> [A]n analysis of United States law and jurisprudence convincingly shows that Art. 36(1) constitutes an individual right both under the domestic law of the United States and according to the interpretations of

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[34] *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 257, para. 38; Order of 3 March 1999, para. 25.

> the Vienna Convention by U.S. courts. Regrettably the U.S. courts have not applied these holdings ... .[55]

In the same vein, the Memorial asks the Court in effect to overrule the judgments of U.S. courts regarding the adequacy of the LaGrand brothers' legal representation.[56]

53. Germany aims particularly harsh criticism at the decisions of United States courts to decline appellate or *habeas corpus* review of claims not initially made at trial (the doctrine of procedural default).[57] In a heated passage, the Memorial contends that U.S. courts (including the Supreme Court of the United States) acted in a "wholly inappropriate" manner when they:

> chose to apply in a persistent and rigorous manner certain rules of U.S. domestic law, in particular the rule of "procedural default", whose effect was that no remedy was available to the LaGrand brothers ... . It was this deplorable attitude in disregard of the United States' obligations under the Vienna Convention, despite the obviousness of the violations committed and sustained over a long period, which eventually barred any relief and led to the execution of Walter and Karl LaGrand.[58]

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[55] Memorial, para. 4.119.

[56] *See, e.g.*, Memorial paras. 4.42, 4.44, 4.68, 4.70 and 4.73 *et seq.*

[57] Memorial, paras. 4.26 *et seq.*

[58] Memorial, para. 4.81.

54. Although the Memorial denies the intention to do so,[59] the texture of its arguments, as well as passages like those quoted above, show that the Court is being asked to sit as an international court of criminal appeal, and to set aside both criminal court judgments and the operation of rules of criminal procedure. This is a role this Court is not empowered or constituted to perform. The Court should decline to adopt it by deciding Germany's remaining claims.

Section III. The Circumstances and Timing Chosen by Germany for Filing its Case Render Germany's Third Submission Inadmissible

55. The two previous objections to admissibility relate to the second, third, and fourth submissions in Germany's Memorial. There are further compelling reasons why the Court should find inadmissible Germany's third submission, concerning the Court's Order of 3 March 1999. These follow from the extraordinary manner in which Germany chose to bring this case. By acting as it did, Germany created a situation that was highly unreasonable and prejudicial, both to the United States and to the proper

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[59] Memorial, para. 1.09. ("Neither does Germany intend, or has ever intended, to use the International Court of Justice as a court of criminal appeals.")

administration of justice. These circumstances render further proceedings to address Germany's claims regarding the Order of 3 March inappropriate.

56. Germany's choice of timing precluded both proper proceedings in the Court and a considered response by the United States to any order the Court might issue. The case did not have to proceed this way. The Memorial shows that German officials learned of Walter and Karl LaGrand in June 1992.[60] During the ensuing six-and-a-half years, Germany did not express concern about the brothers' cases or protest their treatment to the Department of State or other U.S. Federal authorities. The cases were first raised with the Department of State on 27 January 1999, but then in the form of an appeal to the Secretary of State against the application of capital punishment.[61] The cases' consular notification aspect was not raised with the Department of State until 22 February 1999, two days before Karl LaGrand's execution.[62]

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[60] Memorial, para. 2.06.

[61] Letter of Foreign Minister Fischer to Secretary of State Albright, 27 January 1999, Memorial, Annex MG 17, p. 524.

[62] Letter of Foreign Minster Fischer to Secretary of State Albright, 22 February 1999, Memorial, Annex MG 18, pp. 528-531.

57. Germany then chose to file its skillfully prepared Application and Request for the Indication of Provisional Measures in The Hague after normal business hours at 7:30 PM on 2 March 1999,[63] a little over 27 hours before the scheduled execution. Germany's decision to file at this extraordinarily late stage made it impossible for the Court to respond as Germany requested, except by acting *ex parte* and without allowing the Respondent State to be heard. Germany's choices thus precipitated a profound and unsettling change from the previously uniform practice of the Court. Even in cases involving the gravest allegations of ongoing genocide, armed attacks, or other matters threatening immediate and widespread loss of life, the Court has never been placed in a situation where it felt constrained to act in less than 24 hours and without hearing the Respondent.

58. Germany is correct that there is no uniform "statute of limitations" in international law, nor are there clear requirements dictating when a case must be filed with this Court. Some international controversies do linger for years before they are brought to the Court.

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[63] Order of 3 March 1999, p.9.

Nevertheless, the Court should not, through continued proceedings on Germany's third submission, sanction the mode of proceedings brought about by the Applicant's choices. Those choices resulted in the Court having to act without full information, without a hearing and full deliberation, and without regard to the normal requirements to treat parties with equality and to accord each the opportunity to be heard. Finding Germany's claims involving the Court's 3 March Order admissible can only establish such last-minute filings as an acceptable pattern for proceedings in this Court.

59. Perhaps recognizing the inappropriate position in which it placed the Court, the Memorial adopts a somewhat defensive tone regarding the timing of the 2 March filing. It argues that neither international law nor good faith required Germany to consult with the United States concerning its plan to bring this case.[64] It also contends that the late filing was justified by Germany's discovery at the 23 February clemency hearing that Arizona had supposedly acted in bad faith.[65] Germany contends that

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[64] Memorial, para. 3.63 *et seq.*

[65] Memorial, para. 3.65. ("It was only seven days before it brought the dispute to the Court that Germany had become aware of the relevant facts underlying its claims.")

Arizona authorities long knew that the LaGrand brothers were German nationals, but had wrongly concealed their knowledge until it was accidentally revealed by a prosecutor at the clemency hearing.[66]

60. As discussed in Part II, it is odd that German officials had not long before read the pre-sentence reports referred to at the 23 February hearing. They were the key documents considered at the 1984 sentencing proceedings. They were available to the LaGrands' lawyers and to German officials, and are among the exhibits to Germany's Memorial.[67] It is hard to understand how these reports were not already familiar to German consular officers, particularly in light of Germany's sweeping claims regarding the vigor and effectiveness of its consular assistance.

61. Germany's plea that it was ignorant of the facts until 23 February 1999 should not be accepted as

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[66] The German Memorial describes as "shocking" the supposed revelation by counsel for Arizona at the clemency hearing. Memorial, para. 3.65. Arizona's counsel was in fact simply arguing that the failure of consular notification was not prejudicial, since mitigation evidence of the kind Germany said it might have provided was in fact available at the time, as shown by the 1984 pre-sentence reports. Since those reports were available to all parties and are understood to be central to any sentencing procedure in the United States, counsel for Arizona had no reason to think that referring to them would be "shocking" to anyone, and certainly not to diligent German consular officials.

[67] Memorial, Annex MG 2, p. 251.

justification for its last-minute filing for another reason as well. Although it had years to do so, Germany never raised the consular notification issue with the U.S. Department of State so that the facts could be investigated. The practice of investigating complaints of possible failures of consular notification is well established under the Vienna Convention, and is routinely followed by both Germany and the United States, as shown in Part V below. As early as 1992, German officials could have asked the Department of State to investigate the possible violation of Article 36 of the Vienna Convention, including when the LaGrands' German nationality was known to the competent authorities. Indeed, as noted above, the Department of State in 1998 expressly invited all Embassies in Washington to bring possible failures of consular notification to its attention, so that it could investigate and take any appropriate action.

62. Had Germany raised its concerns in a reasonable and timely way, there would have been time for U.S. authorities to carry out a thorough investigation of the facts. Through the investigation conducted in 1999-2000, after Germany finally raised the matter, the Department of State determined that Arizona officials who were "competent

authorities" for purposes of the Convention had information about the LaGrands' German nationality sometime between mid-1983 and the end of 1984. The Department regrets the evident misunderstanding between Arizona and German officials about when this information about the LaGrands' nationality was available, and to whom. Whatever the reasons for that misunderstanding, it would have been avoided had German officials brought the LaGrand case to the attention of appropriate U.S. federal officials promptly.

63. Germany's decision to file as it did resulted in the Court setting aside some fundamental aspects of judicial procedure. Previously, the Court articulated and operated on the twin principles of "equality of the Parties"[68] and of giving each party sufficient opportunity to be heard. In the circumstances following Germany's last-minute filing, neither principle could be observed.

64. In its advisory opinion concerning the *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*,[69] the Court identified both

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[68] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 337, para. 21.

[69] *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 166.

of these principles as necessary to avoid a "failure of justice." The Court stressed

> the fundamental right of a staff member to present his case, either orally or in writing, and to have it considered by the Tribunal before it determines his rights. An error in procedure is fundamental and constitutes "a failure of justice" when it is of such a kind as to violate the official's right to a fair hearing as above defined and in that sense to deprive him of justice.[70]

The Court continued:

> [C]ertain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which have occasioned a failure of justice: for instance, … the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case; [and] the right to equality in the proceedings … .[71]

65. The Court affirmed these principles in its 1982 Advisory Opinion on *Judgement No. 273 of the United Nations Administrative Tribunal.*[72] The Court again emphasized the central importance both of treating the parties with

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[70] *Ibid.*, p. 209, para. 92.

[71] *Ibid.*

[72] *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 325.

equality and of ensuring to both the opportunity to present their views, recalling:

> the principle which, in its 1973 Advisory Opinion, it regarded as a requirement of the judicial process: the principle of equality of the parties. In that Opinion the Court emphasized various applications of the principle; it referred to it first with regard to the decision by the Committee "after an examination of the opposing views of the interested parties." (footnote omitted)[73]

66. Yet, because of Germany's decision to file its case at the last minute, these basic principles of the judicial process could not be observed in relation to the Court's 3 March Order. Germany would now compound this departure from precedent and sound practice by asking the Court to address a claim against the United States wholly predicated upon that Order. It is not appropriate for the Court to continue proceedings based on such a claim. The Court should find it inadmissible.

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[73] *Ibid.*, p. 338, para. 29.

PART IV

THE CLAIMED VIOLATIONS OF THE VIENNA CONVENTION

CHAPTER I

INTRODUCTION

67. As we have emphasized, the United States acknowledges and regrets that there was a violation of the U.S. obligation under Article 36(1)(b) promptly to inform Walter and Karl LaGrand that German consular officials could be notified of their arrest and detention. Accordingly, the United States does not contest Germany's claim that there was a breach of that provision. The United States has already extended an apology for this breach, and has taken and continues to take extensive steps to prevent any recurrence. However, the United States contests the legal validity of Germany's *other* claims related to the failure of consular notification.

CHAPTER II

GERMANY'S CLAIMS OF OTHER VIOLATIONS OF ARTICLE 36

68. Germany claims that the failure to inform the LaGrand brothers of their right to have Germany's Consulate General notified of their arrest and detention -- a failure that unquestionably contravened Article 36(1)(b) -- also violated several other provisions of the Vienna Convention.[74] The Memorial claims that the United States violated, *inter alia*:

-- Germany's right to communicate with its nationals under Article 36 (1)(a);

-- The second sentence of Article 36(1)(a), with regard to the rights of detained persons to communicate with consular officers; and

-- Germany's right to visit and assist detained nationals under Article 36 (1)(c).

69. In each case, however, it is clear that the underlying conduct complained of is the same -- the failure to inform the LaGrand brothers as required by Article 36(1)(b). There is no other basis for contending that German consular officers could not have communicated freely

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[74] Memorial, paras. 4.15, 4.16, and 7.02.

with the LaGrands, that the LaGrands could not have communicated freely with those officers, or that German consular officers were not free to visit and assist the LaGrands at all times after their arrest. Germany's complaint is simply that the LaGrands were not given information that might have prompted them to take steps to initiate such communications and visits.

70. Germany's claims under Articles 36(1)(a) and (c) seem particularly misplaced, given that German consular officials and the LaGrands communicated freely after German consular officials learned of the LaGrands' case in 1992. At that time, they already were providing consular assistance to two other German nationals in the Arizona prison. Thus, it is clear that Germany's access to German nationals in Arizona's prisons, as such, was not impeded. Nor does Germany allege or offer any evidence that Arizona interfered in any way with the LaGrands' access to consular officials when they initially sought to communicate in 1992. Nor does the Memorial claim that Arizona thereafter impeded German consuls' access to the brothers after their German nationality was clarified and German consular officers began to visit them.

71. Indeed, German consular officers visited the LaGrands a number of times beginning in December 1992. Karl was visited at least eight times, and Walter somewhat less, having refused consular visits on at least two occasions.[75] There is no evidence that the frequency of German consular visits was in any way limited by Arizona. Nor is there any evidence that Arizona refused to forward correspondence between German consular officers and the LaGrand brothers. In fact, the LaGrands at all times were free to communicate with German consular officials.

72. In addition, each of these additional claims again rests upon unverifiable factual assumptions about what might have happened. Each assumes that, had the LaGrand brothers been told in 1982 that the Los Angeles German Consulate General could be notified of their arrest, they would have requested such notification and that vigorous and effective consular assistance inevitably would have followed. As discussed in Part II, this is speculation, not proof. It is an insufficient foundation for Germany's string of additional claims.

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[75] U.S. Exhibit 1, p. 9.

CHAPTER III

GERMANY'S CLAIM OF INTERFERENCE WITH RIGHTS OF DIPLOMATIC PROTECTION IS OUTSIDE THE COURT'S JURISDICTION AND DEFECTIVE ON THE MERITS

73. Germany also claims that, because the LaGrand brothers were not informed of the possibility of consular notification, Germany suffered additional legal injury by being denied its right to provide diplomatic protection in respect of individual legal injuries suffered by the brothers.[76] This claim is linked with an extensive legal argument to the effect that consular notification under Article 36 is an individual right that must be enforceable in the criminal justice system.[77]

74. Like Germany's "add-on" claims of consequential violations of additional parts of Article 36 stemming from the failure to inform the LaGrands as required under Article 36(1)(b), it is not apparent what this additional claim contributes to the case. The United States acknowledges and regrets that there was a failure to inform the LaGrand brothers that they could request consular notification. Germany's objective seems to be to wrap that

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[76] Memorial, paras. 4.86 et seq.

[77] This issue is addressed in Part V.

failing in as many overlapping characterizations of consequential illegality as possible. This does not add either to the dignity or the clarity of these proceedings, and does not assist either the Parties or the Court.

75. In any case, to the extent that this claim by Germany is based on the general law of diplomatic protection, it is not within the Court's jurisdiction. The claim does not concern the interpretation or application of the Vienna Convention, and accordingly is not within the jurisdiction of the Court based on the Optional Protocol to the Vienna Convention.

PART V

THE ISSUE OF PROCEDURAL DEFAULT

76. Germany makes the additional argument that the United States violated the Vienna Convention by applying a rule of "procedural default" to the LaGrands' claims in U.S. criminal proceedings based on the violation of Article 31(1)(b). Procedural default rules as applied in the United States generally mean that U.S. domestic courts will not consider claims that have not been raised before the first court capable of adjudicating them. Germany argues that such rules cannot be applied to claims of violations of Article 36 of the Vienna Convention, principally on the ground that the proviso of Article 36(2) requires that violations of the consular notification requirements of Article 36(1) be remedied through the criminal justice systems of States party.[78] Germany also contends that Article 36 itself establishes an individual right, and that the existence and violation of this individual right requires a remedy in the criminal justice process.[79] The

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[78] Memorial, paras. 4.17 *et seq.*

[79] Memorial, paras. 4.86 *et seq.* Germany also relies upon its argument that Article 36 creates individual rights to support its "diplomatic protection" argument. Germany appears to be saying that, to the extent that Article 36 creates individual rights as opposed to governmental rights, the LaGrand brothers satisfied the general requirement of

first of these arguments is plainly wrong. To the extent that the second differs from the first (which for us is a matter of some ambiguity), Germany's arguments do not in any way compel the conclusion that Article 36 requires the establishment of remedies for individual criminal defendants in the criminal justice process. In particular, they do not require the invalidation of convictions or sentences.

77. The heart of Germany's position is the belief that the Vienna Convention requires the United States and presumably all other Parties to the Convention to amend their internal law to ensure the "reversal of judgments … infected by a lack of consular advice."[80] This sweeping argument rests on a fundamentally incorrect view of what the Vienna Convention requires. Germany's position goes far beyond the wording of the Convention, the intentions of the parties when it was negotiated, and the practice of States, including Germany's practice. The Vienna Convention does not require States Party to create a

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international law that they exhaust their domestic remedies (*i.e.*, the remedies available to them in the United States) and that it therefore is appropriate under international law for Germany now to espouse those claims. As we explain in Part IV, however, any claim brought under a general theory of diplomatic protection is outside the Court's jurisdiction.

[80] Memorial, para. 4.18.

national law remedy permitting individuals to assert claims involving the Convention in criminal proceedings. If there is no such requirement, it cannot violate the Convention to require that efforts to assert such claims be presented to the first court capable of adjudicating them.

CHAPTER I

THE PROVISO OF ARTICLE 36(2) DOES NOT REQUIRE REMEDIES IN THE CRIMINAL JUSTICE PROCESS

78. Germany's argument rests principally on a novel reading of Article 36(2), which contains a proviso that the laws and regulations of States Party must "enable full effect to be given to the purposes for which the rights accorded under this article are intended." Germany would read this proviso as a broad prohibition on any domestic law rule that prevents raising at any stage in a criminal appeal a claimed violation of the obligation to inform a foreign national defendant that his consular officials may, if he wishes, be notified of his arrest.[81] The proviso of Article 36(2) cannot be given such an artificial scope.

79. The proviso must first be read in context, in light of the immediately preceding language and of the overall structure and focus of Article 36. Article 36(2) provides as follows:

> 2. The rights referred to in paragraph 1 of this Article [of consular officers and their nationals to communicate, the rights of nationals to have consular officials notified of an arrest or detention, and the rights of consular officers to visit detainees and provide consular assistance] shall be exercised in conformity with the

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[81] Memorial, paras. 4.17 *et seq.*

> laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

In the context of a foreign national in detention, the relevant laws and regulations contemplated by Article 36(2) are those that may affect the exercise of specific rights under Article 36(1), such as those addressing the timing of communications, visiting hours, and security in a detention facility. There is no suggestion in the text of Article 36(2) that the rules of criminal law and procedure under which a defendant would be tried or have his conviction and sentence reviewed by appellate courts are also within the scope of this provision.

80. The *travaux* also make the narrow focus of Article 36(2) clear. The International Law Commission's ("ILC") original proposal for Article 36 included a similar provision, which the ILC explained in terms that focused on the mechanics of prison visits:

> Thus, visits to persons in custody or imprisoned are permissible in conformity with provisions of the code of criminal procedure and prison regulations. As a general rule, ... codes of criminal procedure require the permission of the examining magistrate, who will decide in light of the requirements of the investigation. In

> such a case, the consular official must apply to the examining magistrate for permission. In the case of a person imprisoned in pursuance of a judgement, the prison regulations governing visits to inmates apply also to any visits which the consular official may wish to make to a prisoner who is a national of the sending State.[82]

This emphasis on prison visitation rules continued in the meetings of the Second Committee of the United Nations Conference on Consular Relations as it considered Article 36(2).[83] For example, the delegate from the United Kingdom, in arguing that the ILC's proviso gave too much scope to national regulations, focused specifically on regulations pertaining to prison visits and the delivery of items to prisoners.[84] The concern of this and other delegates who pushed, ultimately successfully, for modification of the ILC's proviso was that restrictions on consular visits not be so severe that such visits could not be effective. There is no suggestion whatever that any State Party thought that the proviso in Article 36(2) in any way required remedies in the criminal justice process for failures to inform detained foreign nationals that they could request consular assistance, or that the proviso would prevent States Party from applying equally to foreign nationals and to their own nationals rules requiring the orderly and timely assertion of defenses in criminal cases.

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[82] United Nations Conference on Consular Relations, Vol. II, A/CONF.25/16/Add.1, Annexes, Doc. A/CONF.25/6, Draft articles on consular relations adopted by the International Law Commission at its thirteenth session, p. 24. Article 36(2) as proposed by the ILC provided that the rights set forth in Article 36(1) "shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must not nullify these rights." *Ibid.*

[83] Article 36(2) was discussed specifically at the 18th and 19th meetings of the Second Committee on March 18, 1963. United Nations Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the First and Second Committees, A/CONF.25/16, pp. 346-48.

[84] The representative of the United Kingdom indicated that, "It was realized that consulates must comply with laws and regulations on such matters as prison visiting and what might be given to the prisoner. It was of the greatest importance, however, that the substance of the rights and obligations in paragraph 1 must be observed." United Nations Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the First and Second Committees, A/CONF.25/16, pp. 346-47.

81. During the plenary session, statements by other delegates directly raised the question of the relationship between State criminal laws and the proviso. The delegates from the Union of Soviet Socialist Republics and Belarus strongly preferred the ILC version of the proviso over the alternative ultimately adopted. In describing their concerns about how the proviso balanced the laws of the receiving State with the rights of consular officials, the delegate from the Union of Soviet Socialist Republics stressed that

> the matters dealt with in Article 36 were connected with the criminal law and procedure of the receiving State,

> which were outside the scope for the codification of consular law.[85]

The delegate from Belarus spoke in similar terms:

> the Conference was drafting a consular convention, not an international penal code, and it had no right to attempt to dictate the penal codes of sovereign States.[86]

While these statements were made in support of the ILC proposal which was not adopted, they nevertheless reflect a publicly stated understanding of the negotiators with respect to the implications of the requirements they were addressing. They are perhaps the most direct references made during the negotiating session to the criminal justice systems of receiving States. Thus, it is significant that neither these statements nor any others elicited any responsive statement expressing the expectation that criminal proceedings would be held in abeyance for consular notification to be completed, or that the results of a criminal justice process would be subject to challenge if notification inadvertently was not given. Thus, the negotiating history does not support Germany's broad reading of the proviso to Article 36(2).

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[85] *Ibid.*, p. 40, para. 3.

[86] *Ibid.*, p. 40, para. 8.

CHAPTER II

ARTICLE 36 AS A WHOLE ALSO DOES NOT SUPPORT GERMANY'S CLAIM

82. The text and negotiating history of Article 36(1) also do not support Germany's claim that failure of consular notification requires individual remedies in the criminal justice system. Indeed, all indications in the text and negotiating history suggest that States Party would regard such a reading as a significant alteration of what they agreed to in the Vienna Convention.

Section I. The Text of Article 36(1) Does Not Require a Remedy in the Criminal Justice Process

83. Article 36(1) has three subparts that were painstakingly negotiated by the United Nations Conference on Consular Relations in a series of difficult sessions of the Second Committee and the Plenary Session.[87] The initial vote to adopt Article 36 in the Plenary Session failed, and the article was reconsidered and adopted only after the last-minute addition of the final sentence of Article

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[87] The Second Committee considered Article 36, focusing primarily on Article 36(1), on March 14, 15, and 18, 1963. United Nations Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the First and Second Committees, A/CONF.25/16, pp. 331-348. The Plenary Session then took up Article 36 on April 17, 1963, when a vote to adopt it failed, and again on April 20, 1963. *Ibid*, pp. 35-46 and 81-87, respectively. For a review of the negotiating history, *see* L. Lee, *Consular Law and Practice* (1991), pp. 133-151.

36(1)(b), which was proposed as a compromise by the United Kingdom.[88] As a result of this compromise, Article 36(1)(b) reflects two separate notification obligations: the obligation to notify consular officials if the detainee so requests, and the further obligation, stated in the final compromise sentence, to inform the detained foreign national of the option to have consular officials notified. As previously shown in Part IV, this case properly relates only to the obligation to inform the foreign national of the option to have consular officials notified of the detention.[89]

84. Significantly, nothing in Article 36 relates these notification obligations to the criminal justice process. Article 36 provides that both notification obligations must be carried out "without delay," but does not define this term or relate it to any particular event in the criminal justice process.[90] Nor does Article 36

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[88] Document A/CONF.25/L/50, United Nations Conference on Consular Relations, Vol. II, A/CONF.25/16/Add.1, p. 171.

[89] Also as shown in Part IV, while Germany seeks to implicate other aspects of Article 36, it has not identified any failure by Arizona to honor a request from either Walter or Karl LaGrand to notify the relevant consular post, or to allow consular contact or access once requested.

[90] When States have wished to define a precise time by which the consular notification procedure must be completed, they have done so by concluding agreements separate from the Vienna Convention. For example, the United States and a number of other States have negotiated

specify the *manner* in which consular officials must be notified, leaving it open to States party to use a variety of methods, including ones that result in notification occurring after critical events in a criminal investigation have occurred.[91]

85. Article 36 also does not establish a role for the consular officer in the foreign national's defense in criminal proceedings. Thus, while Article 36(1)(c) establishes that consular officials must be permitted to visit detained nationals, to converse and correspond with them, and to arrange for their legal representation, detained persons need not accept such assistance. A consular officer must refrain from taking any action on behalf of a detainee that the detainee opposes.[92]

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bilateral consular agreements that provide enhanced consular protections beyond those contained in the Convention. In some of these agreements, the parties have allowed each other up to four days to provide consular notification following a detention or arrest. Even these agreements, however, do not tie consular notification to any particular stage of an investigation or prosecution. *See* U.S. Department of State, *Consular Notification and Access* (January 1998), pp. 47-49 (summarizing bilateral agreements between the United States and other countries).

[91] The Declaration of Edward Betancourt, U.S. Exhibit 8, describes a number of the ways in which consular notification is provided.

[92] A detainee may in fact reject consular assistance for a variety of reasons, including to protect his privacy, because of a general distrust of his own government, or because he considers it unnecessary (*e.g.*, in the case of a long-term, assimilated resident). *See ibid.*

86. Moreover, neither Article 36, nor any other provision in the Vienna Convention, obligates consular officials to provide any measure of substantive consular assistance in any criminal case, whatever the charges or the potential penalty. Article 36 provides for the *notification* of consular authorities at the request of a detained person, but does not confer on the detained individual a substantive right to compel consular assistance.

87. Thus, the language and structure of Article 36(1) do not support any claim that the receiving State must hold its criminal justice process in abeyance pending the provision of consular services. Because Article 36(1) does not link the justice process to consular notification, it cannot be read to require that receiving States provide remedies in the criminal justice process if Article 36(1) is not fully observed.

Section II. The Negotiating History of Article 36(1) Contradicts Germany's Claim

88. The negotiating history also conflicts with Germany's claim that Article 36 requires the creation of remedies as part of the criminal justice process. As noted earlier, the Vienna Convention was negotiated on the basis

of draft articles prepared by the International Law Commission. The relevant ILC proposals did not require authorities to inform arrested persons that their consul could be notified. This obligation was added at the Conference, where Article 36 was negotiated with great difficulty; final agreement came only two days before the Conference ended. Some delegations supported the ILC's initial draft of Article 36, which would have required that receiving States automatically notify sending States' consuls whenever a national was arrested. Many other States strongly opposed this. They argued, among other things, that this requirement would impose an excessive practical burden on the receiving State, particularly a receiving state with large numbers of immigrants, and that the national might not want his government authorities to know about his arrest.[93]

89. The debate on the ILC draft, on the numerous amendments offered to it, and on the final amendments that ultimately became Article 36(1) gives no indication that the negotiating States expected or intended failures of

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[93] United Nations Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the First and Second Committees, A/CONF.25/16, pp. 331-348 (Second Committee sessions of March 14, 15, and 18, 1963), pp. 35-46 (Plenary Session of April 17, 1963), pp. 81-87 (Plenary Session of April 20, 1963). *See* Lee, *supra* note 87, pp. 138-139.

consular notification to invalidate subsequent legal proceedings. Moreover, there was express discussion of the possibility that such failures would occur, particularly if notification was required in every case. For example, in offering an amendment to change the ILC's original proposal to state that the obligation to inform the sending State only arises *if the national so requests,* the delegate of Egypt explained his amendment as follows:

> The purpose of the amendment is to lessen the burden on the authorities of receiving States, especially those which had large numbers of resident aliens or which received many tourists and visitors. *The language proposed in the joint amendment would ensure that the authorities of the receiving State would not be blamed if, owing to the pressure of work or other circumstances, there was a failure to report the arrest of a national of the sending State.*[94]

90. These and other statements in support of requiring notification only when requested by the detainee, as was ultimately agreed, show that the Conference recognized that Article 36 presented practical problems of compliance that would be addressed through the normal

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[94] United Nations Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the First and Second Committees, A/CONF.25/16, p. 82 (Plenary Session of April 20, 1963). (Emphasis added.)

processes of diplomatic adjustment.[93] Had the parties thought failures of consular notification would require or result in the invalidation of subsequent criminal proceedings, the many States that expressed fears about the burden of the notification requirement would surely have rejected the text now before the Court. Thus, the negotiating history of Article 36 does not support Germany's broad view of the consequences of non-compliance with Article 36.

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[93] At an earlier stage of the debate, for example, the United Kingdom suggested that concerns about compliance could be addressed through bilateral agreements to waive rights where mutually convenient. United Nations Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the First and Second Committees, A/CONF.25/16, p. 340, para. 21 (Second Committee session of March 15, 1963). Other delegations implied that technical violations in cases of brief arrests might be overlooked. *E.g., ibid.*, p. 338, para. 10 (delegate from Yugoslavia), p. 341, para. 37 (delegate from France).

CHAPTER III

STATE PRACTICE, INCLUDING GERMANY'S OWN PRACTICE, CONFLICTS WITH GERMANY'S CLAIM

91. State practice, which is particularly instructive for such a widely accepted Convention, also conflicts with Germany's claim. The U.S. Department of State has conducted an extensive survey of State practice under the Vienna Convention in response to past expressions of concern regarding U.S. consular notification practices, and has continued to monitor State practice under the Convention carefully. These efforts are described in the Declaration of a senior State Department consular official, Edward Betancourt, on State practice regarding consular notification and access at U.S. Exhibit 8. As indicated in that declaration, States Party to the Vienna Convention throughout the world operate on the understanding that a criminal proceeding against a foreign national can proceed regardless of whether consular notification or assistance is provided.[96]

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[96] Germany suggests that a different rule is emerging in the United States. (Memorial, paras. 4.116-4.119.) In fact, the current trend is the opposite. The 9th Circuit Court of Appeals decision described in paragraph 4.118 of the Memorial has been withdrawn, and both the 9th and the 1st Circuit Courts have adopted a rule that failures of consular notification are not appropriately remedied by suppressing evidence or other similar measures in the criminal process. *United States v. Nai Fook Li*, 2000 WL 217891 (1st Cir., February 29, 2000); *United States v.*

92. Indeed, Germany's Memorial does not claim that German courts would invalidate a conviction or sentence when there has been a failure of consular notification. We question whether Germany (or very many other Parties to the Convention) could make such a representation. Germany's claim in this case that the Vienna Convention requires individual remedies in the criminal justice system, including the invalidation of convictions, fundamentally conflicts with the manner in which States, including Germany, actually implement the Convention.

93. As Mr. Betancourt describes, violations of Article 36 are common and States characteristically deal with violations of consular notification obligations through diplomatic means, not through judicial setting aside of convictions. When a consular officer learns of a failure of notification, a diplomatic communication often is sent to protest the failure. Most States accept responsibility to investigate alleged violations and, if necessary, to remind the appropriate "competent authorities" of their responsibilities. If notification procedures are not followed, it is also common for the host government to

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Lombera-Camorlinga, 2000 WL 245374 (9th Cir., March 6, 2000). These decisions are provided to the Court as U.S. Exhibit 9.

apologize and to undertake to ensure improved future compliance.

94. This has been precisely the practice followed by Germany. For example, less than a month after Germany commenced this suit, the German Foreign Ministry sent the United States Embassy a note responding to the Embassy's complaint about a failure of consular notification in the case of a U.S. citizen arrested in Germany on August 26, 1997, and convicted on December 16, 1997.[97] The Ministry's note is accompanied by a letter from the Senator for Justice and Constitutional Matters of Bremen, acknowledging the requirements of Article 36 and reporting the results of the official investigation into the failure to notify U.S. consular officers. The letter acknowledges that the U.S. citizen may not have been informed of his right to request notification, that the citizen apparently requested notification nonetheless, but that the competent authorities -- in this case, prison officials -- forgot to notify U.S. consular officials as requested. The letter apologizes for the error and advises of the steps taken to avoid repetition. Neither the German note nor letter suggests that the conviction would in any way be affected

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[97] U.S. Exhibit 10.

by the breach of Article 36. German officials similarly investigated and apologized in another case involving a protracted failure of notification in 1998.[98]

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[98] **U.S. Exhibit 11.**

CHAPTER IV

EVEN IF ARTICLE 36 IN SOME SENSE ESTABLISHES INDIVIDUAL RIGHTS, THERE IS NO REQUIREMENT THAT THOSE RIGHTS BE JUSTICIABLE IN NATIONAL CRIMINAL JUSTICE SYSTEMS

95. Germany also argues at length that Article 36 establishes an individual right.[99] This argument serves as the predicate for Germany's claim that the failure to inform the LaGrands, as required by Article 36(1)(b), violated Germany's customary law right to exercise diplomatic protection of its nationals.[100] Germany also appears to suggest, however, that a violation of Article 36 must be remedied in national criminal justice systems because individual rights are at issue.

96. As shown above, however, the Vienna Convention does not require States Party to remedy violations of Article 36 through their criminal justice systems. This conclusion does not turn on whether Article 36 in some sense incorporates or confers individual rights.[101]

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[99] Memorial, para. 4.86 *et seq.*

[100] As noted in Part IV, this claim is outside the Court's jurisdiction under the Optional Protocol in that it is predicated upon customary law, and not the Vienna Convention.

[101] The two U.S. appeals courts that have recently considered this issue (*see supra* note 96, and U.S. Exhibit 9) concluded that it is not necessary to address whether Article 36 in some sense creates individual rights, because Article 36 in any event does not require the

97. The rights of consular notification and access under the Vienna Convention in any event are rights of States, not individuals. Clearly they can benefit individuals by permitting -- not requiring -- States to offer them consular assistance, but the Convention's role is not to articulate or confer individual rights. Rather, the Convention establishes a set of legal rules regulating consular relations between States, including such matters as the establishment of consular relations, the appointment of consular staff, and various exemptions from host State regulation. The Preamble emphasizes the inter-State character of this system.[102]

98. In the limited areas where the Convention addresses relationships between States and individuals, it does so to facilitate the performance of consular functions by States. Article 36 thus is entitled "Communication and contact with nationals of the sending State," and emphasizes the ability of consular officers to communicate

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suppression of evidence or other remedies in the criminal justice system.

[102] The Preamble affirms that the Convention would "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems." In the same vein, the Preamble declares that the purpose of privileges and immunities under the Convention "is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States ... ."

with their nationals. Indeed, Article 36 is located in a section of the Convention pertaining expressly to the "Facilities, Privileges And Immunities Relating To A Consular Post".

99. In two phrases, indisputably, Article 36 does express ideas in the vocabulary of "rights". This vocabulary implements the compromise described above between those countries that advocated notification to consular officials of all detentions and those who sought notification only when specifically requested by the detainee. Had mandatory notification been adopted, Article 36 would not have referred to the situation of the individual at all, and notification to consular officials would have occurred regardless of the individual's wishes.[103]

100. There was considerable discussion among the drafters of the Vienna Convention about the appropriateness of referring at all to individual rights, focusing

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[103] The original ILC proposal read as follows: "The competent authorities shall, without undue delay, inform the competent consulate of the sending State if, within its district, a national of that State is committed to prison or to custody pending trial or is detained in any other manner." This proposal did not reference the rights of individuals, and the commentary to it made clear that it was the ability of consular officials to perform their functions that was at issue. Document A/CONF.25/6, United Nations Conference on Consular Relations, Vol. II, A/CONF.25/16/Add.1, p. 24.

particularly on how Article 36(1)(a) should address the ability of the foreign national to communicate with a consular official. As Germany has reviewed in its Memorial,[104] a number of delegates expressed the view that the Convention should recognize the individual right of a foreign national to communicate with his or her consular officials, but this was a matter of great controversy and no clear consensus emerged. At a point during the negotiating sessions, when Article 36(1)(a) referred to the right of the national to communicate with a consul and to the right of a consul to communicate with a national, a delegate from Venezuela objected to any reference to an individual right. He noted that the Conference was charged with negotiating a convention on consular relations, and that it was inappropriate for the convention to speak of individual rights.[105] The subsequent discussion elicited numerous perspectives, including the observation that consular communications inherently involve the State, on the one hand, and the individual, on the other.[106] It also resulted in a reversal of the order of Article 36(1)(a), so that it came to refer first to the right of the consul to communicate with the individual, and second to the right of the individual to communication with the consul.[107] That reversal underscores the fundamental point, that the position of the individual under the Convention derives from the right of the State party to the Convention, acting through its consular officer, to communicate with its nationals. The treatment due to individuals is inextricably linked to and derived from the right of the State. Indeed, during the negotiations, the United Kingdom argued that the burden of a provision requiring notification in all cases could be managed by States waiving their rights under the convention.[108] This proposal surely would not have been made if the delegates had thought they were creating rights of individuals independent of the rights of States.

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[104] Memorial, paras. 4.97-4.107.

[105] United Nations Conference on Consular Relations, Vol. I, Summary records of plenary meetings and of the First and Second Committees, A/CONF.25/16, p. 331, para. 32 (Second Committee session of March 14, 1963).

[106] *Ibid.*, p. 333, para. 50 (observations of India).

101. While the exact nature of the position of individuals under the Convention does not lend itself to easy characterization, the relevant question here is only whether the Vienna Convention requires States party to

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[107] *Ibid.*, p. 334, para. 2 (amendment offered by Venezuela and others).

accord individual foreign nationals judicially enforceable remedies in their criminal justice systems. The text of Article 36, its negotiating history, and the practice of other States Party to the Convention all indicate that it does not.

102. In contrast, Germany's sweeping view, if accepted, could have broad repercussions not only for this case, but also for each of the 163 parties to the Convention. To our knowledge, adoption of this expansive view is being advocated primarily, if not solely, in the United States, where two appellate courts have recently rejected it.[109] So far as we are aware, in no other country, including Germany, is serious consideration being given to providing the kind of expansive remedy under the Vienna Convention advocated by Germany.[110] The Court should

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[108] *Ibid.*, p. 340, para. 21 (Second Committee session of March 15, 1963).

[109] *See supra* notes 96 and 101 and U.S. Exhibit 9.

[110] Insofar as the United States knows, this remains true with respect to those States Party to the American Convention on Human Rights ("Pact of San Jose"), 1114 UNTS 123, opened for signature November 22, 1969; entered into force July 18, 1978. (The United States is not a Party.) This is of particular interest because, in an advisory opinion released October 1, 1999, following a request by Mexico and supported by several parties to the Convention (Advisory Opinion OC-16/99), the Inter-American Court reached conclusions that could well have prompted those States to change their practices, if they agreed that consular notification is an integral part of the criminal justice process.

The Inter-American Court of Human Rights is established by the American Convention, which in Article 64 permits the Court to provide non-binding advisory opinions "regarding the interpretation of [the not read into a clear and nearly universal multilateral instrument such a substantial and potentially disruptive additional obligation unsupported by the text and far beyond the understandings and practice of the States party. There are few situations in which States actually have agreed by treaty that the failure to observe specific standards can be the basis for appeal to an international tribunal for possible reversal of a conviction or sentence. Where States have elected to create such mechanisms, they have done so expressly and with great precision.[111] They have not created such additional remedies indirectly or

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American Convention] or of other treaties concerning the protection of human rights in the American states." Mexico asked the Court to render an advisory opinion with respect to the nature of the obligations of Article 36 of the Vienna Convention on Consular Relations and the remedies that should be provided in the case of violations. Among the Inter-American Court's non-binding conclusions are that foreign nationals must be informed that they may request consular assistance before any statement is taken from them, and that capital punishment may not be carried out in any case where consular notification was not provided. The United States has reservations regarding these and some of the Court's other advisory conclusions, for reasons suggested by this Counter-Memorial. However, to our knowledge neither Mexico nor any other State Party to the American Convention has sought to apply the Court's advice to its procedures for interrogating defendants or has vacated or altered sentences in criminal proceedings because of failures of consular notification.

[111] Examples include regional instruments and institutions such as the European Convention on Human Rights, which provides for the Strasbourg Court, and the American Convention on Human Rights, which provides for the Inter-American Court of Human Rights. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 221, signed November 4, 1950; entered into force September 3, 1953; *American Convention on Human Rights, supra* note 110.

implicitly, as Germany wrongly suggests was done through Article 36.

103. Accordingly, the proviso to Article 36(2) does not require that States authorize individuals to attack their criminal convictions and sentences through individual criminal proceedings. Neither does the text of Article 36 overall require such remedies, regardless of whether it in some sense recognizes rights of individuals. If there is no obligation under the Convention to create such individual remedies in criminal proceedings, the rule of procedural default -- requiring that claims seeking such remedies be asserted at an appropriately early stage -- cannot violate the Convention.

PART VI

THE COURT'S ORDER OF 3 MARCH 1999

104. Part III of the Counter-Memorial showed why the claims involved in Germany's second, third, and fourth submissions are inadmissible. However, should the Court find Germany's claims to be admissible, this Part shows that the United States has not violated any international legal obligations related to the Court's 3 March 1999 Order indicating provisional measures. Chapter I reviews the circumstances of the Court's Order. Chapter II shows that the United States acted in conformity with the Order. Chapter III examines the language of the Order, and shows that, by its terms, it did not create binding legal obligations. Accordingly, the Court can resolve this claim by Germany on the bases set out in these three sections, and need not confront the difficult and controversial general question of the status of its indications of provisional measures under international law. Should the Court feel it necessary to address the question, however, the fourth Chapter analyzes the effect of the Court's Order under relevant provisions of the Court's Statute and the Charter of the United Nations. It shows that the Order did not give rise to international legal obligations that were violated by the United States.

CHAPTER I

THE CIRCUMSTANCES OF THE COURT'S ORDER AND ACTIONS TAKEN IN RESPONSE

Section I. Germany's Filing and the Court's Order

105. Germany chose to file its Application and Request for the Indication of Provisional Measures after the close of business at 19:30[112] in The Hague on the evening of 2 March, approximately 27¼ hours before the time set for the execution of Walter LaGrand. The Registrar presumably informed the Members of the Court of the filing, and steps were taken by the President of the Bench to ascertain judges' views on procedure and substance.

106. Also that evening, the Registrar transmitted a copy of Germany's Application and Request for the Indication of Provisional Measures to the United States Embassy in The Hague by facsimile machine. The copy received at the Embassy is time-stamped "2 Mar. 1999 21:48 INTERNATIONAL COURT OF JUSTICE". The text was relayed to the Department of State in Washington and was received there late in the afternoon of 2 March, sometime after 22:00 The Hague time/ 16:00 Washington time. The

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[112] At all relevant times, the local time in The Hague was six hours ahead of the time in Washington, D.C., and eight hours ahead of the time in Arizona.

Application and Request for Provisional Measures were then promptly transmitted by facsimile to the legal staff of the Governor of Arizona.

107. In an unprecedented move, the Court then acted without giving the United States an opportunity before the Order was issued to present its views regarding the merits of Germany's request for provisional measures. In this regard, a representative from the United States Embassy in The Hague was invited by the Vice-President to a meeting also attended by Germany's Agent on the morning of 3 March. That meeting did not provide an opportunity for substantive discussion. The views expressed by the U.S. representative were summarized in the Court's Order of 3 March:

> Whereas, on 3 March 1999, at 9:00 (The Hague time), the Vice-President of the Court received the representatives of the Parties ... ; whereas ... , referring to the provisions of Article 75 of the Rules of Court, [the representative of the German Government] asked the Court to indicate forthwith, and without holding any hearing, provisional measures *proprio motu*; and whereas the representative of the United States pointed out that the case had been the subject of lengthy proceedings in the United States, that the request for provisional measures submitted by Germany was made at a very late date and that the United States would have strong objections to any procedure such as that proposed only that very morning by the representative of Germany which would result in the Court making an Order

> *proprio motu* without having first duly heard the two Parties.[113]

Under the circumstances, a hurried meeting like that described in the Court's Order simply is not an appropriate or sufficient opportunity for the United States or any other respondent in a case in this Court to present its defense.

108. In explanation of the decision to act without a hearing, paragraph 21 of the Court's Order indicates that the Court was acting -- for the first time -- pursuant to Article 75(1) of the Rules of Court. Article 75(1) provides that:

> The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties.

However, it seems clear that the Court was not acting on its own initiative such that the authority of Article 75(1) provided an appropriate basis for action. The terms of the Court's Order quote Germany's Application, the Request for the Indication of Provisional Measures, and even Germany's oral representations at length. The terms of the Order make clear that Germany's requests, and not the Court's own initiative, were the predicate for the 3 March Order.

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[113] Order of 3 March 1999, p. 13, para.12.

109. Under Article 74 of the Rules of Court, any request for the indication of provisional measures triggers the requirement that the Court arrange "a hearing which will afford the parties an opportunity of being represented at it." In an earlier case under what would seem to be more compelling circumstances, the Court declined to exercise its authority under Article 75 following a request for provisional measures. The Court recalled this decision in its Second Order in the *Bosnia Genocide* case:

> Whereas by a letter of 11 August 1993 in response to the letter of 4 August 1993 from the Agent of Bosnia-Herzegovina ..., the Registrar ... reiterated the view of the Court ... that the Court did not consider that the question arose of the exercise of its powers under Article 75, paragraph 1, of the Rules of Court
>
> > "where, as in the present case specific requests for the indication of provisional measures ... have been made by each of the Parties",
>
> and that, in its view,
>
> > "those powers do not in any event extend to indicating measures without affording both Parties the opportunity of being heard."[114]

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[114] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 334, para. 13.

110. The Court's Order granting Germany's request for provisional measures was read at a sitting the following evening, 3 March, beginning at 19:15 The Hague Time/13:15 Washington time. This was less than 24 hours after Germany filed its case and just under four hours before the time set for the execution of Walter LaGrand.[115] Following the reading, a United States Embassy official in The Hague immediately telephoned the Office of the Legal Adviser at the Department of State in Washington, D.C. and reported the substance of the Order. The text was also transmitted to Washington by telefax, where it was received at about 14:30 Washington time.

111. Thus, the Court's Order arrived in Washington about two-and-a-half hours before the time set for Walter LaGrand's execution. As indicated by the Order, the Acting Legal Adviser of the Department of State promptly transmitted the Order to the Governor of the State of Arizona by facsimile. The Legal Adviser (who was traveling in Thailand with the Secretary of State) was awakened and informed of the Order's contents by telephone.

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[115] International Court of Justice Press Communiqué 99/8. ("This evening, at 7 p.m., the International Court of Justice (ICJ) will give

Section II. Germany's Case in the U.S. Supreme Court

112. At about the time this Court's Order was received in Washington on the afternoon of 3 March, Germany filed a separate case in the Supreme Court of the United States. Germany's filing included a motion for leave to file a bill of complaint and a motion for a preliminary injunction to prevent the execution of Walter LaGrand.[116] This filing, along with two other simultaneous actions involving Walter LaGrand which reached the Supreme Court that day,[117] brought the matter to the sole federal organ that constitutionally might have had power to halt the execution of Mr. LaGrand. At approximately 4:25 PM,[118] the Clerk of the Supreme Court wrote the Solicitor General of the United States and urgently requested the Solicitor General's views regarding Germany's action in the Supreme Court. (The Solicitor General is the fourth-ranking official of the Department of Justice and represents the United States before the Supreme Court.)

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its decision on the request for the indication of provisional measures made by Germany ... .")

[116] Memorial, Annex MG 27, p. 615.

[117] *See* Memorial, para. 2.15; Memorial, Annex MG 30, p. 665; Memorial, Annex MG 31, p. 669.

[118] Letter of U.S. Solicitor General to the U.S. Supreme Court (3 March 1999), Memorial, Annex MG 28, p. 655.

113. The Solicitor General then had a very short time in which to answer. He responded that, based on a limited understanding of Germany's claim and the related circumstances, the United States did not believe that either the Vienna Convention or the Court's Order provided a sufficient basis for the United States Supreme Court to grant a stay.[119]

114. This statement of views was not intended to be disrespectful of the International Court of Justice. Rather, the Solicitor General sought to convey to the Supreme Court the United States understanding of the legal situation, which in turn reflected the reality -- previously acknowledged by Germany's President and Justice Minister[120] -- that under the United States constitutional system, the conviction and execution of Walter LaGrand was a matter within the authority of the State of Arizona.

115. The Supreme Court of the United States denied Germany's motion for leave to file the bill of complaint as well as its motion for a preliminary injunction to stay the execution of Walter LaGrand. In a short opinion, the Supreme Court cited the large number of likely

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[119] *Ibid.*

[120] Memorial, Annex MG 14, p. 507 and Annex MG 20, p. 537.

jurisdictional obstacles to hearing the case, as well as the "tardiness of the pleas" put forward by Germany.[121]

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[121] For example, the Supreme Court expressed concern that the United States had not waived its sovereign immunity and noted that it was "doubtful" that Article III of the U.S. Constitution would provide "an anchor for an action to prevent execution of a German citizen who is not an ambassador or consul." With respect to the action against the State of Arizona, the Court stated that "a foreign government's ability here to assert a claim against a State is without evident support in the Vienna Convention and in probable contravention of Eleventh Amendment principles." ***Germany v. United States,*** **119 S.Ct. 1016 (1999); Memorial, Annex MG 32, p. 677. The Eleventh Amendment of the U.S. Constitution states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State."**

CHAPTER II

THE UNITED STATES ACTED AS CALLED FOR BY THE COURT'S ORDER

116. This Chapter shows that the United States did what was called for by the Court's 3 March Order, given the extraordinary and unprecedented circumstances in which it was forced to act. The heart of the Court's indication of provisional measures consisted of two provisions. The authoritative English text states:

> (a) The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order;
>
> (b) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona.[122]

117. First, as noted above, the United States promptly took the action called for in second paragraph of the Court's operative statement that: "The Government of the United States of America should transmit this Order to the Governor of the State of Arizona."

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[122] Order of 3 March 1999, p. 16 , para. 29.

118. The United States also complied with the Court's further request that "The United States of America should take all measures at *its disposal* to ensure that Walter LaGrand is not executed pending a final decision in these proceedings."[123] By immediately transmitting the Order to the Governor of Arizona, the United States placed the Order in the hands of the one official who, at that stage, might have had legal authority to stop the execution. Otherwise, the measures at the United States Government's disposal were exceedingly limited.

119. Two central factors constrained the United States ability to act. The first was the extraordinarily short time between issuance of the Court's Order and the time set for the execution of Walter LaGrand. There was enough time to transmit the Order to Arizona, but not to identify and take any further measures, which would have required review of complex and disputed factual and legal issues, as well as involvement of numerous high officials within the federal Executive branch and judiciary. While the adjudication of important matters in this Court often quite properly takes years of careful proceedings, the Court's Order in this case allowed about two hours for

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[123] Emphasis added.

response. Assessing the bases for further action -- not to mention undertaking required consultation with senior officials and effective coordination among them -- in such a short period of time simply was not possible.

120. In the *Breard* case, where the Court's Order indicating provisional measures provided somewhat more time for analysis and action, the Secretary of State wrote to the Governor of Virginia asking the Governor to stay the execution of Angel Francisco Breard.[124] Germany's Memorial suggests a similar step might have been an option in this case.[125] As explained above, however, the Court's 3 March Order did not allow time for consideration -- much less implementation -- of such an action in this case.

121. The second constraining factor was the character of the United States of America as a federal republic of divided powers. Under the constitutional order developed at a conference of state delegates in Philadelphia in 1787 and in force since 1789, the separate states of the United States retain their independence and authority except in the areas where the Federal Government has been allocated power by the Constitution of the United States. The

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[124] Memorial, Annex MG 37, p. 755.

separate states are not subsidiary bodies subordinate to the power of the Federal Government and subject to its direction. Rather, they remain sovereign and the masters of their affairs within the areas of responsibility reserved to them by the United States Constitution.[126]

122. One of the most important functions reserved to the states is criminal law enforcement, including the right to impose and administer capital punishment in serious cases prescribed by state law, provided it is done consistently with rights guaranteed by the Federal Constitution. Although Federal law establishes some Federal crimes, criminal law enforcement for crimes such as murder in the United States largely lies within the authority and responsibility of the states. Federal statutes give the Federal courts specified powers to review state criminal proceedings to ensure that those proceedings have complied with rights guaranteed by the United States Constitution. There is no general Federal power of review of state court criminal proceedings.

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[125] Memorial, para. 4.169

[126] *See* the Tenth Amendment of the United States Constitution, which states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." For a general discussion of the limits on Federal power under the United States Constitution, *see* L. Tribe, *American Constitutional Law* (1988), pp. 209-399.

123. Prior to the filing of this case, senior German officials regularly recognized these characteristics of the United States Federal system. In writing to President Clinton on 5 February, President Herzog acknowledged that:

> [Y]ou have no means at law to influence the decision ... of Ms. Jane Dee Hull, the Governor of Arizona.[127]

Similarly, in writing to the U.S. Attorney General, Germany's Federal Minister of Justice stated that:

> I am well aware that you do not have any legal avenues for influencing the decision on whether to grant clemency, since this decision has to be taken by the Governor of Arizona, Ms. Jane Dee Hull.[128]

124. The United States does not refer to the central role of the states in matters of criminal justice in order to avoid its international legal obligations. The United States recognizes the fundamental principle that domestic law does not relieve a member of the international community of its obligations under international law. The United States also recognizes that there was a breach of an important international legal obligation when Arizona state officials failed to give consular notification as required

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[127] Memorial, Annex MG 14, p. 511.

[128] Memorial, Annex MG 20, p. 541.

by the Vienna Convention on Consular Relations. We explain our federal system so that the Court will understand that Federal Government officials do not have legal power to stop peremptorily the enforcement of a criminal sentence by the state of Arizona.

125. Some writers contend that United States domestic law might have offered further exceptional avenues for Federal authorities to block Arizona from acting in the hours following the Court's order. Various untried mechanisms for such urgent action have been suggested, including the suggestion of an order by the President of the United States directing a state governor to prevent the execution.[129] In a government that operates under the rule of law, the chief executive is not asked to sign orders of any kind without careful preparation and research to ensure that the order is legally authorized and sound. An Executive order to a state governor to stay an execution would have been unprecedented and fraught with legal uncertainty. Responsible Federal officials did not judge

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[129] *See* K. Highet, "The Emperor's New Clothes; Death Row Appeals to the World Court? The *Breard* Case As a Miscarriage of (International) Justice," in *Essays* in Memoriam *Judge José Maria Ruda*, Memorial, Annex MG 39, p. 763; C. Vázquez, "*Breard* and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures", 92 *Am. J. Int'l L.* (1998), p. 683.

that such steps against the State of Arizona were an available legal course under the circumstances of this case, particularly in the brief time allowed by the Court's Order.

126. Accordingly, in drawing the Court's Order to the attention of the Governor of Arizona, U.S. officials took the only relevant measure at their disposal, given the few hours available. It is wholly unreasonable to suppose that any more definitive actions could have been taken under the circumstances, even if they had been theoretically feasible under the United States legal structure.[130]

127. The third element of the Court's Order indicated that the United States "should inform the Court of all the measures which it has taken in implementation of this Order." This was done via a letter from the Legal Counselor of the United States Embassy in The Hague to the Court dated 8 March 1999. The letter described the communications between the Federal Government and the state of Arizona, as well as the proceedings in the United States Supreme Court referred to above.

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[130] Germany's Memorial goes so far as to suggest that the United States took "a number of active steps ... which paved the way for the execution of Walter LaGrand." (Memorial, para. 4.171) To the contrary, any ability the United States might have had to take actions -- affirmative or negative -- *vis-à-vis* the LaGrand case, beyond simply reacting to the multiple proceedings initiated by Germany, was effectively precluded by the last-minute timing chosen by Germany for its filings, both with this Court and the United States Supreme Court. When the Supreme Court requested the views of the Solicitor General, for example, he was duty-bound to reply as accurately as possible in the time allowed.

CHAPTER III

THE COURT'S ORDER BY ITS TERMS DID NOT CREATE BINDING LEGAL OBLIGATIONS

128. The previous section shows how the United States responded as fully as possible to the Court's Order, given the circumstances and the extraordinarily short time for response available in the circumstances. This section considers the legal ramifications of this particular Order in light of the terms used by the Court in framing it.

129. The terms of the Court's 3 March Order did not create legal obligations binding on the United States. When considering how to determine whether a resolution of the Security Council is or is not mandatory, the Court made the following observation:

> The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25 [of the United Nations Charter], the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, ...[131]

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[131] *Legal Consequences for Status of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971*, p. 53, para. 114.

The same principles can be applied in assessing the character of the Court's Order here.

130. The language used by the Court in the key portions of its Order is not the language used to create binding legal obligations. Instead, the key passages state that the United States "should" take specified actions.[132] This is the distinctive phrasing regularly used in international legal affairs when parties choose to signal an expectation -- even a high expectation -- that something will be done, but not an intention to create mandatory legal obligations.

131. Both this Court and the Permanent Court of International Justice have consistently used the term "should" when indicating provisional measures.[133] By

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[132] Since English is the authoritative text of the 3 March Order, there is no need for consideration of other languages in this context.

[133] As to the Court's practice, see, *e.g.*, *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 248; *Application of the Convention on the Prevention of the Crime of Genocide, Orders of 13 September 1993 and 16 April 1993, I.C.J. Reports 1993*, pp. 325 and 3 (respectively); *Frontier Dispute, Provisional Measures, Order of 10 Jaunary 1986, I.C.J. Reports 1986*, p. 3; *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984*, p. 169; *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 7,; *Nuclear Tests (Australia v. France and New Zealand V. France), Interim Protection, Orders of 22 June 1973, I.C.J. Reports 1973*, pp. 99 and 135 (respectively); *Fisheries Jurisdiction (United Kindom v. Iceland and Federal Republic of Germany v. Iceland), Interim Protection, Orders of 17 August 1972, I.C.J. Reports 1972*, pp. 12 and

contrast, this Court uses very different language when issuing final judgments intended to express or create legally binding obligations. Thus, for example, the Court in the *Fisheries (U.K. v. Iceland)* case stated that "the Government of Iceland and the Government of the United Kingdom are under mutual *obligations* to undertake negotiations ... ."[134] In the *Nicaragua* case, the Court found the United States to be in "violation" or "breach" of numerous obligations under international law.[135] Perhaps most emphatically, in its Judgment in the *Diplomatic Staff* case, the Court decided, *inter alia*, that Iran "*must* immediately take all steps to redress the situation resulting from the events of 4 November 1979 ... ."[136]

132. The Court has also explicitly declined to recognize as binding French terminology translated as

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30 (respectively); *Anglo-Iranian Oil Co., Interim Protection, Order of 5 July 1951, I.C.J. Reports 1951*, p. 89.

[134] *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 34, para. 79(3) (emphasis added).

[135] *See Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 123, 128, 140, 146, paras. 238, 252, 280, 292.

[136] *United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment, I.C.J. Reports 1980*, p. 44, para. 95(3) (emphasis added).

"should." In the *Aegean Sea* case,[137] the Court rejected an argument by Greece that, based on the use of the word "décidé" and the words "doivent être résolus" in the original text (which the Court understood in English to refer to a "decision" regarding matters that "should be resolved"[138]) a joint communiqué issued by Greece and Turkey constituted a "definitive agreement" to submit the dispute to the Court.

133. In light of the many years of such consistent practice by the Court, the international community has come to recognize that explicit wording must be used by international tribunals where their intention is to create binding obligations. For example, the International Tribunal of the Law of the Sea, which, as discussed more fully below,[139] is empowered to "prescribe" rather than "indicate" provisional measures, uses the word "shall" in its orders prescribing such measures.[140]

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[137] *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, pp. 38-44, paras. 94-108.

[138] *Ibid.* at p.43, para. 105

[139] *See* para. 144 below.

[140] *See M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, Order of 11 March 1998*, 37 *I.L.M* (1998) p. 1202; *Southern Bluefin Tuna Cases (New Zealand v. Japan and Australia v. Japan), Provisional Measures, Order of 27 August 1999*, 38 *I.L.M.* (1999) p. 1624 (English texts authoritative).

134. The type of language used by international tribunals when they clearly intend to create binding obligations is further illustrated by the orders of the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR"). For example, in its warrant for arrest and order of surrender of Slobodan Milošević (24 May 1999), the ICTY "directed" UN Member States to "arrest, detain, and surrender" Milošević to the tribunal.[141]

135. The use of "should" in non-binding contexts and of quite different terminology (such as "shall" or "must") where a binding legal obligation is intended is also common practice in the drafting of treaties and other international instruments. Thus, a statement adopted at the 1993 United Nations Conference on Environment and Development entitled "Non-legally binding authoritative statement of principles for a global consensus on the management of conservation and sustainable development of all types of forests" uses "should" (along with other qualified language) consistently throughout the text.[142]

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[141] *The Prosecutor v. Slobodan Milošević*, Warrant of Arrest and Order for Surrender, Case No. IT-99-37-1, Decision of 24 May 1999, The International Criminal Tribunal for the Former Yugolslavia, U.S. Exhibit 12.

[142] Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management of Conservation and Sustainable

Academic commentators also recognize the role played by the term "should" to indicate non-binding undertakings. For example, a recent article on the draft Multilateral Agreement on Investment ("MAI") proposed revisions of the text reflecting this very terminology:

> To bring the national treatment language in line with the MAI's non-binding treatment of investor obligations and environmental safeguards, "shall" should be replaced with "should" or with "shall endeavor to" in the MAI's section on national treatment.[143]

136. United States domestic courts regularly construe the term "should" in this same sense. A Florida state court has opined that

> [t]he section [of the Florida Administrative Code] dealing with resignations states that an employee "should" present reasons for his resignation in writing to the agency. Use of the word "should" indicates to us that the procedure for resignations is discretionary rather than mandatory in nature.[144]

In a different context and another corner of the country, an Idaho court held that

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Development of All Types of Forests, June 13, 1992, U.N. Doc A/CONF.151/6/Rev.1, 31 *I.L.M.* 881.

[143] M. Vallianatos, "De-Fanging the MAI," 31 *Cornell Int'l L.J. (1998)* p. 713, at p. 718 (footnotes omitted).

[144] *University of South Florida v. Tucker*, 374 So.2d 16 (1979).

> the MUTCD [Manual of Uniform Traffic Control Devices] provides that the term "should" is "an advisory condition" and that, where it is used, the action it refers to is "recommended but not mandatory." Therefore, the traffic indications described ... are merely recommendations, not mandatory in nature.[145]

137. The word "should" is thus a term used both by the Court and in many other settings to indicate a call or an exhortation for action, but not a binding legal obligation. As such, any perceived deviation by the United States from the terms of the Court's 3 March Order would not in any sense constitute a violation of obligations under international law.

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[145] *Lawton v. City of Pocatello*, 886 P.2d 330; 126 Idaho 454 (1994).

CHAPTER IV

PROVISIONAL MEASURES OF THE COURT DO NOT CREATE BINDING LEGAL OBLIGATIONS BY OPERATION OF ARTICLE 41 OF THE STATUTE OF THE COURT OR OF ARTICLE 94 (1) OF THE UNITED NATIONS CHARTER, OR BY OPERATION OF GENERAL PRINCIPLES OF INTERNATIONAL LAW

Section I. Introduction

138. As the previous discussions show, the United States did all that could plausibly be expected of it in the roughly two hours available to respond to the Court's Order, and to the other actions brought concurrently in United States courts by Germany. Further, the language employed in the Order of 3 March makes clear that this particular Order did not in any case impose binding legal obligations. Thus, the Court does not need here to decide the difficult and controversial legal question of whether its orders indicating provisional measures would be capable of creating international legal obligations if worded in mandatory, not precatory, terms. This Chapter is therefore included solely to assist the Court should it nevertheless determine that it must decide this issue.

139. It must be acknowledged, as Professor Rosenne observes, that

> [t]he question of whether ... an indication of provisional measures is binding on the parties to the provisional measures proceedings is controversial.[146]

However, as one contemporary commentator has concluded:

> There can be little doubt ... that the preponderant view is that an indication of interim measures [by the International Court of Justice] is not binding.[147]

The United States shares this view.

140. The following discussion examines how the language and history of Article 41(1) of the Court's Statute and Article 94 of the Charter of the United Nations, the Court's and State practice under these provisions, and the weight of publicists' commentary, all show that indications of provisional measures do not have mandatory effect under international law. This section also addresses Germany's more theoretical arguments in favor of such mandatory effect and underscores that, whatever the general rule may be, the rushed *ex parte* proceedings leading to the Order in this case counsel that

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[146] S. Rosenne, *The Law and Practice of the International Court, 1920-1996* (3rd Ed. 1997), Vol. III, p. 1434. The history of the controversy has been thoroughly and thoughtfully analyzed and documented by Professor Jerzy Sztucki in his 1983 book *Interim Measures in the Hague Court*, pp. 260-302.

[147] L. Collins, "Provisional and Protective Measures in International Litigation," in *Recueil des Cours/Collected Courses of the Hague Academy of International Law 1992*, III, vol. 234 (1993) p. 219.

it should not be deemed to give rise to obligations that implicate State responsibility.

Section II. The Constitutive Instruments of the Court Do Not Confer Authority to Issue Binding Provisional Measures

141. The Court's authority to indicate provisional measures derives from Article 41 of its Statute, the text of which makes clear that indications of provisional measures do not give rise to binding legal obligations. The text of Article 41 is the foundation of the Court's authority in this area, and must be carefully examined:

> 1. The Court shall have the power to *indicate*, if it considers that circumstances so require, any provisional measures which *ought to be taken* to preserve the respective rights of either party.
>
> 2. Pending the final decision, notice of the measures *suggested* shall forthwith be given to the parties and to the Security Council. (Emphasis added.)

This text is in substance identical to Article 41 of the Statute of the Permanent Court of International Justice, substituting reference to the United Nations Security Council for reference to the Council of the League of Nations.

142. The language of Article 41 is not the language that lawyers employ to create legal obligations. Three

aspects stand out. First, provisional measures are to be "indicated" by the Court, not "prescribed". The verb "indicate" has been defined as follows:

> To point out or point to or toward with more or less exactness: show or make known with a fair degree of certainty.[148]

Thus, the key verb does not convey the notion of prescription or obligation. Rather, "to indicate" involves the idea of pointing out or identifying a course of action, and of doing so in a way that is not necessarily certain or precise in every respect.

143. The international community has recognized that "indicate" does not mean "prescribe," and has taken care to make clear when the goal is to grant compulsory power. Thus, in the 1928 General Act for the Pacific Settlement of International Disputes, Article 33(1) states:

> In all cases where a dispute forms the object of arbitration or judicial proceedings ... the Permanent Court of International Justice, acting in accordance with Article 41 of its Statute ... shall lay down within the shortest possible time the provisional measures to be adopted. *The*

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[148] *Webster's Third New International Dictionary* (1981), p. 1150. The *Oxford English Dictionary* defines "indicate" similarly to mean: "To point out, point to, make known, show (more or less distinctly)." *Oxford English Dictionary* (1989), Vol. VII, p. 860.

> *parties to the dispute shall be bound to accept such measures.*[149]

It is very unlikely that the sentence highlighted above would have been added if the drafters of the General Act had believed that provisional measures issued under Article 41 of the Permanent Court's Statute were *per se* binding.

144. In the same vein, Article 290 of the Law of the Sea Convention empowers the International Tribunal for the Law of the Sea ("ITLOS") to "prescribe" rather than to "indicate" provisional measures.[150] The significance of this difference in terminology was explained in 1991 by the Registrar of this Court in a statement made at a meeting of the ITLOS Preparatory Commission:

> On the issue of provisional measures, ... [t]he use of the term 'prescribe' rather than 'indicate', which was the expression employed in the Court's Statute, seemed to suggest that the [Law of the Sea] Convention's measures would be binding ... . In the case of the International

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[149] Pacific Settlement of Disputes (General Act), done at Geneva, September 26, 1928, 93 LNTS 343 (1928), p. 357 (emphasis added).

[150] United Nations Convention on the Law of the Se[illegible] opened for signature December 10, 1982, U.N. Doc. A/CONF.62/122 ([illegible]2), 21 *I.L.M.* 1261 (1982). *See* J. Noyes, "The International Tribunal for the Law of the Sea," 32 *Cornell Int'l L.J.* (1998), p. 109, in which the author states, "It is beyond cavil that [ITLOS] provisional measures are binding." *Ibid.* at 135.

Court, it could only 'indicate' what measures were to be provided.[151]

145. When the language of Article 41 was originally considered in 1920 by the Advisory Committee of Jurists, a conscious decision was made to substitute the word "indiquer" for "ordonner", the word used in the initial proposal.[152] A corresponding change was made in the English from "order" to "suggest".[153] (When the text was later considered by the League of Nations Assembly, "indicate" was substituted for "suggest" in the English text in order to better conform it to the French; however, an explicit effort to restore the term "ordonner" was rejected on the basis that the "Court lacked the means of execution."[154])

146. Germany's Memorial cites Hudson's attempt to explain the use of the term "indiquer" as simply "being

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[151] United Nations Press Release, SEA/1284, 29 August 1991, reproduced in R. Platzöder, *The Law of the Sea: Documents 1983-1991* (1992), Vol. XIII, p. 510.

[152] Sztucki, *supra* note 146, at p. 264. For the text of the original proposal, *see Permanent Court of International Justice, Advisory Committee of Jurists, Procès Verbaux of the Proceedings of the Committee* (1920) (hereinafter "ACJ I"), p. 609.

[153] ACJ I, *supra* note 152, at p. 666.

[154] *League of Nations. Permanent Court of International Justice. Documents concerning the Action taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court* (1920) (hereinafter "ACJ II"), p. 134.

designed to avoid offense to the susceptibilities of states."[155] However, other prominent observers at the time took precisely the opposite view. For example, Åke Hammarskjöld, Registrar and later judge on the Permanent Court, wrote a seminal article in 1935 making and elaborating the point that to "indicate" is not to "order".[156]

147. The second key aspect of the wording of Article 41 is that the indicated measures are those which "*ought* to be taken". This is also not the language of legal obligation but of encouragement or exhortation. The same dictionary defines "ought" as "used to express moral obligation, duty".[157] This is not directive, mandatory language.

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[155] Memorial, para. 4.139, citing M. Hudson, *The Permanent Court of International Justice, 1920-1942* (1943), p. 425.

[156] Å. Hammarskjöld, "Quelques aspects de la question des mésures conservatoires en droit international positif" (1935), reproduced in Å. Hammarskjöld, *La juridiction internationale* (1938), p. 299. *See also* Sztucki, *supra* note 146, at p. 281, and J. Elkind, *Interim Protection: A Functional Approach* (1981), p. 155.

[157] *Webster's Third New International Dictionary* (1981), p. 1599. The relevant definition for "ought" in the *Oxford English Dictionary* states:

> The general verb to express duty or obligation of any kind; strictly used of moral obligation, but also with various weaker shades of meaning, expressing what is befitting, proper, correct, advisable, or naturally expected.

Oxford English Dictionary (1989), Vol. X, p. 991.

148. Once again, the drafting history supports this understanding: The original proposal considered by the Advisory Committee of Jurists used the term "must"; in later versions, it was changed to "should".[158] Ultimately, the Assembly of the League of Nations substituted the phrase "ought to".[159] While the League Assembly clearly intended to strengthen the degree of moral force behind the measures contemplated by this provision, the language used is still the language of exhortation, not of obligation. The League Assembly stopped far short of reinstating the term "must".

149. Third, Article 41(2) describes the measures as being "suggested". They are not "ordered", "required", or any of many other forms of words that normally indicate legal obligation. Provisional measures are "suggestions", albeit of a special character and entitled to special weight and consideration. Again, the drafting history bears out this interpretation. The initial English version used the phrase "notice of these measures," and this was changed by the Advisory Committee of Jurists to read

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[158] ACJ I, *supra* note 152, at pp. 666, 681, and 736, respectively.

[159] ACJ II, *supra* note 154, at p. 134. *See also* Sztucki, *supra* note 146, at p. 264.

"measures suggested".[160] Despite its close scrutiny of and other changes to this provision, the League Assembly opted to leave this phrase intact.

150. The legal effect of Article 41 was again addressed at length in connection with certain amendments proposed in 1931. At that time, the Court considered a proposed revision by Judge Fromageot that would have directed the Court to take note of, and report to the League's Security Council, a failure by a party to abide by a provisional "order" of the Court.[161] According to a record of the meetings to discuss the 1931 revisions, "M. Fromageot said he had used the word 'order' advisedly; the word 'indicate' employed in the Statute and Rules appeared to him somewhat vague."[162]

151. Other judges objected to the use of the word "order", and a substantial discussion of the character or weight of the Court's indications of provisional measures ensued. While views were expressed on both sides of the issue, in the end, Judge Fromageot's proposal was rejected

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[160] ACJ I, *supra* note 152, at pp. 609, 681, 736.

[161] *Permanent Court of International Justice. Acts and Documents Concerning the Organization of the Court*, Ser. D, No. 2, Add. 2 (1931), p. 289.

[162] *Ibid.* at p. 182.

by eight votes to two.[163] This discussion highlights that, under the predecessor to the Court's present Statute, indications of provisional measures did not implicate State responsibility. We know of nothing in the history of the Court's present Statute suggesting a different conclusion regarding its effect.

152. The German Memorial attaches significance to the other official languages of Article 41 of the Court's Statute and argues that at least three of those languages, the French, the Spanish, and the Chinese convey a greater degree of obligation.[164] However, these arguments are far from conclusive. For example, as Germany recognizes, the key word used in the Russian translation ("указать" or "ukazat") at least arguably conveys a degree of ambiguity on this point similar to the English term "indicate".[165] In any case, the authoritative text of the Court's 3 March 1999 Order was in English.[166] It should therefore be

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[163] *Ibid.* at pp. 181-99. *See also* Sztucki, *supra* note 146, at pp. 267-8.

[164] Memorial, paras. 4.149, 4.150.

[165] Memorial, para. 4.150. The United States would defer to those on the Court whose mother tongues are implicated by such arguments. However, a consultation of Russian dictionaries by Department of State language experts indicates that the phrase "direct, order or prescribe" was not included as one of the meanings of the verb "ukazat" in one of the most authoritative such dictionaries (С.И. Ожегов, Словарь русского языка (1990)).

[166] Order of 3 March 1999, at p. 16.

construed in accordance with the English text of Article 41, and in a way that does not disregard its clear language.

153. Both the language and the history of Article 41 thus confirm that it is not a source of binding legal obligations. In this connection, the United States takes note of Germany's suggestion in its Memorial that, pursuant to Article 32 of the Vienna Convention on the Law of Treaties, the *travaux préparatoires* need not -- indeed should not -- be considered by the Court, presumably because of Germany's belief that its interpretation of Article 41 of the Court's statute leaves no room for reasonable debate.[167] As is clear from the arguments in this case, however, Article 41 is at the very least susceptible to different readings. Moreover, as one commentator on the Vienna Convention on the Law of Treaties has said:

> [N]o rigid temporal prohibition on resort to the *travaux préparatoires* of a treaty was intended by the use of the phrase 'supplementary means of interpretation' in what is now Article 32 of the Vienna Convention. The distinction between the general rule of interpretation and the supplementary means of interpretation is intended rather to

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[167] Memorial, at paras. 4.151-152.

> ensure that the supplementary means do not constitute an alternative, autonomous method of interpretation divorced from the general rule.[188]

154. Article 94 of the Charter also shows the non-binding character of indications of provisional measures. Article 94 establishes the basic obligation of States to comply with judgments of the Court. This fundamental Charter obligation of compliance relates to the definitive expressions of the Court - its judgments. It does not extend to other types of actions by the Court. Article 94 provides:

> 1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
>
> 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

155. Although paragraphs 1 and 2 use different language - paragraph 1 speaks of "the decision" of the

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[188] I.M. Sinclair, *The Vienna Convention on the Law of Treaties* (1984), p. 116. It also bears noting that, elsewhere in its Memorial - and presumably where the history seems more in line with Germany's argument, Germany does not hesitate to discuss the relevant *travaux préparatoires* at some length. *See, e.g.*, Memorial, para. 4.97 *et seq.*

Court, while paragraph 2 speaks of "a judgment" - their scope is the same. As Judge Mosler explains,

> [t]he term 'decision' ('*décision*') ... is tantamount to the term 'judgment' ('*arrêt*'). This interpretation follows from the usage of both terms in Arts. 57-60 of the Statute and in Art. 94 of the Charter. These provisions refer, in their context, to the judgment or judgments on the merits, including judgment on the form and amount of reparation.[169]

The reference to the Court's "decision" in paragraph 1 is singular. It is the Court's final act - its ultimate decision - to which Article 94(1) applies. Moreover, "decision" is modified by the definite article "the." This shows that the paragraph relates to the single final or definitive action of the Court - its judgment.[170] In the words of a former deputy registrar of the Court:

> La juxtaposition des termes, l'emploi de l'article défini et du singulier, tout concourt à montrer que "la décision"

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[169] Mosler, "Article 94" in *The Charter of the United Nations. A Commentary* (1994), pp. 1003-4 (B. Simma, ed.). (Judge Mosler agrees with Germany's position here: that indications of provisional measures are legally binding. However, this stems from his analysis of Article 41, and does not rest on Article 94. *Id.*)

[170] H. Kelsen, *The Law of the United Nations* (1951), p. 720. As Germany points out in its memorial (para. 4.132), other commentators have taken a different view of Article 94(1). However, the United States does not share the view offered by Germany that "logic as well as an analysis of the object and purpose of Article 94 must lead to" Germany's conclusions regarding Article 94. Professor Sztucki offers a thoughtful and well-reasoned discussion of this issue in his book on provisional measures and the Court. Sztucki, *supra* note 146, at 285-6, 289.

> dont il s'agit est celle qui règle définitivement un litige, donc l'arrêt final ou l'ensemble des arrêts finals.[171]

156. In light of such factors, as Judge Singh concluded (reluctantly, but we believe correctly), Article 94 does not give rise to a duty of compliance corresponding to that due the final judgments of the Court:

> The limitations of [Article 94(2) of the Charter] ... as a means of securing compliance with a judgment (and the fact of its virtual non-use for that purpose) are well known: it is doubtful that the 'obligations incumbent ... under a judgment' extend, for example, to respect for an order indicating provisional measures. [footnote omitted][172]

157. Germany's Memorial asserts that during the December 1979 oral proceedings on the United States request for provisional measures against Iran in the *Diplomatic Staff* case, Mr. Owen, the Agent for the United States, suggested that the obligation under Article 94(1) of the Charter might extend to the Court's orders indicating provisional measures. Germany refers to the following statement by Mr. Owen:

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[171] A. Pillepich, "Article 94," in *La Charte des Nations Unies* (1991), p. 1281 (J. Cot and A. Pellet, eds.).

[172] Judge N. Singh, *The Role and Record of the International Court of Justice* (1989), p. 42.

> Iran has formally undertaken pursuant to Article 94 paragraph 1 of the Charter ... to comply with the decision of this Court in any case to which Iran might be a party. Accordingly, it was the hope and expectation of [the United States Government] that the Government of Iran, in compliance with its formal commitments and obligations, would obey any and all Orders and Judgments which might be entered by this Court in the course of the present litigation.[173]

However, when considered in its totality, this statement does not necessarily convey the legal interpretation Germany finds in it. The first sentence is essentially a paraphrase of Article 94(1). It must be read in connection with the second sentence, which expresses the expectations of the United States in light of the broad fabric of Iran's international obligations at the time. The "formal commitments and obligations" referred to embrace the whole range of treaty and other obligations breached by Iran when it allowed the takeover of the United States Embassy compound. The argument is broad and political in character, as shown by the use of the somewhat tentative terms "hope and expectation," rather than a more categorical expression of direct legal obligation to comply with the provisional measures ordered by the Court.

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[173] Memorial, para. 4.132, citing *United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Pleadings, I.C.J. Reports 1980*, p. 266 (Statement of Roberts Owen).

158. Accordingly, the principal texts governing the regime of provisional measures - Article 41 of the Statute and Article 94 of the Charter - both show that such measures do not impose legal obligations that bring into operation the regime of State responsibility.

Section III. The Court's Practice Confirms the Non-Binding Character of Indications of Provisional Measures

159. The Court's judgments have reflected the same understanding of these governing texts. The Court simply has not treated indications of provisional measures as giving rise to international legal obligations for States.

160. The Court considered the implications of an order indicating provisional measures most clearly with reference to those indicated in the *Nicaragua* case. The Court there described the consequences stemming from such an order in language indicating that such measures have a particular weight and authority, but at the same time making clear that they are not sources of binding legal obligations:

> When the Court finds that the situation requires that measures of this kind should be taken, it is incumbent on each party to take the Court's indications seriously into

> account, and not to direct its conduct solely by reference to what it believes to be its rights.[174]

As Judge Shahabuddeen explained in connection with the *Bosnia Genocide* case:

> That [Court's] statement [in the *Nicaragua* case] ... stopped short, in its careful formulation, of saying that provisional measures are binding. Indeed, it could bear the interpretation that the measures themselves are not binding, a party merely having a duty to take account of the Court's indication of them.[175]

161. The practice of States also shows that the Court's indications of provisional measures have not been understood to impose binding legal obligations. Indeed, for the most part, Parties have not carried the actions recommended by the Court into full effect, leading one commentator to observe, albeit reluctantly, that:

> It is at least open to argument that States themselves have built up a body of practice, treating interim measures as

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[174] *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 144, para. 289.

[175] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 365. *See also*, H.W.A. Thirlway, "The Indication of Provisional Measures by the International Court of Justice," in *Interim Measures Indicated by International Courts* (1994), pp. 32-3 (R. Bernhardt, ed.).

> nonbinding. In other words, it could be argued that there has been a *de facto* clarification of Article 41.[176]

162. The Court's judgments have rarely found such lack of compliance worthy even of mention. Thus, in the *Anglo-Iranian Oil Company* case, the Court stated that its order on provisional measures had ceased "to be operative," but did not comment on Iran's failure to comply with the provisional measures it had indicated.[177] In the *Fisheries Jurisdiction* cases, the judgments noted the fact that Iceland did not act consistently with the Court's indication of provisional measures, but did not ascribe legal weight to this.[178]

163. In *Nuclear Tests*, the Court noted the Government of Australia's argument that the French had committed a "deliberate breach of the Order" indicating provisional measures.[179] However, the Court did not express any view on the point or identify any consequences in its judgment. In

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[176] Elkind, *supra* note 156, at p. 164.

[177] *Anglo-Iranian Oil Company (United Kingdom v. Iran), Preliminary Objection, I.C.J. Reports 1952*, p. 114.

[178] *Fisheries Jurisdiction (United Kingdom v. Iceland; Germany v. Iceland) I.C.J. Reports 1974*, pp. 16-17, para. 33, and p. 188, para. 32 (respectively). ("Iceland ... notwithstanding the measures indicated by the Court, began to enforce the new Regulations ...").

[179] *Nuclear Tests (Australia v. France), I.C.J. Reports 1974*, p. 259, para. 19.

the *Diplomatic Staff* case, the Court confined its comments regarding Iran's failure to comply with provisional measures to the following: "it is a matter of deep regret that the situation ... has not been rectified ... ."[180] Regret, perhaps, but not the breach of a legal obligation.

164. An extensive and consistent body of practice thus indicates that neither States nor the Court have understood indications of provisional measures to impose legal requirements.

Section IV. Germany's Functional Argument For A Binding Obligation To Comply With Provisional Measures Also Lacks Merit

165. Germany advances a further, more theoretical argument that provisional measures must have binding effect based not on legal texts or other positive indications of international law but on what it terms "the principle of institutional effectiveness."[181] In essence, Germany contends that for the Court to be able to issue final judgments that are binding under international law, it must have inherent authority to issue interim orders with the same effect. However, as Professor Sztucki demonstrates,

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[180] *United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment, I.C.J. Reports 1980*, p. 42, para. 92.

[181] Memorial, paras. 4.125-7. *See also* Memorial, paras. 4.141, 4.147-8.

whatever the symmetrical appeal and logic this argument may have, it is flawed, because "there is in international law no such peremptory correlation between the legal effects of final and interlocutory decisions."[182] In an arena where the concerns and sensitivities of States, and not abstract logic, have informed the drafting of the Court's constitutive documents, it is perfectly understandable that the Court might have the power to issue binding final judgments, but a more circumscribed authority with respect to provisional measures.

Section V. Whatever the General Rule May Be, This Order Should Not Be Construed to Have Binding Legal Character

166. Whatever the general rule may be, in the unique circumstances here, the Court should not construe its order as creating legal obligations that trigger the rules of State responsibility. Germany's Memorial acknowledges that the legal weight of any indication of provisional measures can be affected by the surrounding circumstances:

> *In principle, and subject to a careful analysis of each specific order,* the breach of an order of the Court brings

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[182] Sztucki, *supra* note 146, at p. 291. Professor Sztucki cites a number of examples to support this conclusion at p. 263, and elaborates further his argument at pp. 291-94.

> into operation the ordinary principles of state responsibility.[183] (Emphasis added.)

We do not agree with the asserted general proposition, even "in principle". However, there are compelling reasons for the 3 March Order not to be interpreted to be legally binding, given the extraordinary and rushed process leading to it.

167. As we have shown, Germany's decision to file this case when and as it did was unreasonable, unnecessary and placed the Court in an extremely difficult position. The Court could respond to Germany's action only through the exceptional step of an *ex parte* order, based solely on the legal claims and factual representations of one party. Then, the Party to whom the Order was directed was given only about two hours in which to respond.

168. Because of the press of time stemming from Germany's last-minute filing of the case, basic principles fundamental to the judicial process were not observed in connection with the Court's 3 March Order. Thus, whatever one might conclude regarding a general rule for provisional measures, it would be anomalous -- to say the least -- for

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[183] Memorial, para. 3.32.

the Court to construe this Order as a source of binding legal obligations.

Section VI. The United States Conduct Following Initiation of This Proceeding Also Has Not Violated Any Customary International Law Obligations

169. Toward the end of its discussion of the Court's 3 March Order, the Memorial adds a cursory point to the effect that:

> The United States has violated the obligation to refrain from any action which might interfere with the subject matter of a dispute while judicial proceedings are pending.[184]

Such a claim involves issues of general law, not the Vienna Convention. Hence, the Court does not have jurisdiction to consider it under the Optional Protocol. The implications of the rule as presented by Germany are potentially quite dramatic, however. Germany appears to contend that by merely filing a case with the Court, an Applicant can force a Respondent to refrain from continuing any action that the Applicant deems to affect the subject of the dispute. If the law were as Germany contends, the entirety of the Court's rules and practices relating to provisional measures would be surplussage. This is not the law, and this is not how States or this Court have acted in practice.

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[184] Memorial, para. 4.147.

PART VII

THE COURT CANNOT CREATE OR COMPEL A GUARANTEE REGARDING FUTURE CONDUCT

170. Germany's final submission calls for the Court to adjudge and declare:

> [T]hat the United States shall provide Germany a guarantee that it will not repeat its illegal acts and ensure that, in any future cases of detention of or criminal proceedings against German nationals, United States domestic law and practice will not constitute a bar to the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations.[185]

171. Germany thus seems to request that the Court somehow require the United States to confer upon Germany new or additional rights exceeding those already existing by reason of the Convention. Such a request goes beyond any remedy that the Court can or should grant, and should be rejected. The Court's power to decide cases in its role as the principal judicial organ of the United Nations does not extend to the power to order a State to provide any "guarantee" intended to confer additional legal rights on the Applicant State.

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[185] Memorial, para. 7.02.

172. As Professor Rosenne observes:

> The International Court is not a legislative body established to formulate new rules of law. In a sense this is stating the obvious. Nevertheless, confusion persists. The Court, like all courts, applies the *existing* law. It does not "create" new rules of law either for the parties to a given dispute or for the international community at large.[186]

173. The United States does not seek license to commit future breaches of its obligations under the Vienna Convention. The United States keenly appreciates the importance of the Vienna Convention's consular notification obligation for foreign citizens in the United States as well as for U.S. citizens traveling and living abroad. As explained in Part II, U.S. authorities are working energetically to strengthen the regime of consular notification at the state and local level throughout the United States, in order to reduce the chances of cases such as this recurring. The United States would welcome the suggestions and assistance of the Government of Germany in those endeavors. Nevertheless, the relevant legal obligations are those contained in the Vienna Convention. The United States does not believe that it can be the role of the Court, in the performance of its judicial function, to impose any obligations that are additional to or that differ in character from those to which the United States consented when it ratified the Vienna Convention.

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[186] S. Rosenne, *The World Court. What It Is and How It Works* (1995, Fifth Revised Ed.), p. 38 (emphasis in original).

PART VIII

CONCLUSION AND SUBMISSIONS

174. The United States acknowledges that there was a breach of the Vienna Convention obligation of consular notification in the cases of Karl and Walter LaGrand. The United States has apologized to Germany for that breach, and is working to prevent any recurrence. The United States disputes the admissibility of Germany's further claims. In any case, for the reasons shown in this Counter-Memorial, Germany's claims other than those directly related to the acknowledged breach of the consular notification obligation should be rejected on their merits.

175. Accordingly, on the basis of the facts and arguments set forth in this Counter-Memorial, and without prejudice to the right further to amend and supplement these submissions in the future, the United States asks the Court to adjudge and declare that:

(1) There was a breach of the United States obligation to Germany under Article 36 (1)(b) of the Vienna Convention on Consular Relations, in that the competent authorities of the United States did not promptly give to Karl and Walter LaGrand the notification required by that Article, and that the United States has apologized to Germany for this

breach, and is taking substantial measures aimed at preventing any recurrence; and

(2) That all other claims and submissions of the Federal Republic of Germany are dismissed.

27 March 2000

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